(32,228)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 661

THE EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE IN BANKRUPTCY OF KNAUTH, NACHOD & KUHNE, PETITIONER,

vs.

THE FIRST NATIONAL BANK OF TRINIDAD, COLORADO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Amended Petition.

United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH, and THEODORE W. KNAUTH, trading as partners under the firm name and style of KNAUTH, NACHOD & KUHNE, and OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON and JOHN R. HALL, individually, Bankrupts, and HERBERT B. SMITHERS, MARY W. KNAUTH and THEODORE W. KNAUTH, Alleged Bankrupts.	In Bankruptcy. No. 34,996.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The amended petition of First National Bank of Trinidad, Colorado, by its attorneys, O'Brien, Boardman, Parker & Fox, respectfully shows:

1. Upon information and belief, that on or

about June 15, 1923, an involuntary petition in bankruptcy was filed in this Court against the above-named firm and the members thereof individually, and said firm and the members thereof were thereafter, by orders of this Court, duly adjudicated bankrupts.

2. Upon information and belief, Middleton S. Borland, Esq., was, by order of this Court, duly appointed Receiver in Bankruptcy herein and duly qualified as such, and took possession of the assets of the said bankrupts. Thereafter the said Middleton S. Borland was duly elected Trustee of the estate of the said bankrupts, duly qualified as such, and as such Trustee took possession of all the assets of said bankrupts.

3. Petitioner is a corporation duly organized under and by virtue of the National Banking Laws.

4. Prior to May 19, 1923, the bankrupts, in order to induce petitioner to enter into trade relations with them, offered to accept from petitioner from time to time sums of money and to use the same for the payment of drafts to be drawn by petitioner upon certain designated foreign correspondents of bankrupts and advised by petitioner to bankrupts.

5. Heretofore and on or about May 19, 1923, petitioner, in acceptance of said offer, drew its draft No. 61,161 on Banca Commerciale Italiana at Sassari, Italy, wherein and whereby it directed said Banca Commerciale Italiana to pay to Zara Sanna Giovanni, upon presentment of said draft by her, 24,360 lire, and on or about the same day petitioner delivered to the bankrupts the sum of $1,191.20, to be used for the payment of said draft

when presented and not otherwise, and the bankrupts accepted said sum and agreed with petitioner to use the same for the payment of said drafts when presented, and for no other purpose. 7

6. The bankrupts failed to cause said sum of $1,191.20 or any part thereof to be used for the payment of said draft when presented and, by reason thereof, the said draft, although duly presented by said Zara Sanna Giovanni, was not paid when presented but was then dishonored.

7. Upon information and belief, the said sum of $1,191.20, so delivered to the bankrupts, has come into and now is in the possession and control of the said Trustee, who has refused to return the same, although duly demanded. 8

FOR A SEPARATE AND COMPLETE COUNT.

8. Petitioner realleges each and every allegation contained in paragraphs of the amended petition numbered "1," "2," "3," "4" and "5."

9. Upon information and belief, there existed at all the times herein mentioned, to the knowledge of the bankrupts, a custom on the part of Banca Commerciale Italiana to charge the account of the bankrupts with the amount of drafts drawn against it upon receipt of advice thereof from the bankrupts and thereupon to set aside and appropriate said amount to the payment of said drafts when presented. 9

10. Upon information and belief, the bankrupts, on or about May 22, 1923, notified Banca Commerciale Italiana of the drawing of the aforesaid draft upon it and requested Banca Commerciale Italiana to charge the same to their account; upon

information and belief, that the said advice was received by Banca Commerciale Italiana on or about June 4, 1923, and thereupon the said Banca Commerciale Italiana, with the knowledge and acquiescence of the bankrupts, set aside in a separate fund and appropriated to the payment of said draft the sum of 24,360 lira, and charged the same against the account of the bankrupts.

11. Upon information and belief, thereafter, and while said lira remained so set apart and appropriated by said Banca Commerciale Italiana to the payment of the aforesaid draft when presented, but before presentation thereof, the receiver of the estate of the bankrupts, theretofore appointed, instructed and directed Banca Commerciale Italiana not pay the said draft when presented and to return the amount so set apart and appropriated to the receiver.

12. Upon information and belief, the said moneys so set apart and appropriated to the payment of said draft were thereafter, and pursuant to said direction of the receiver, returned as directed by the receiver and came into, and now are, in the trustee's possession and control, and the trustee has refused to return the same, although duly demanded.

13. Upon information and belief, the said draft was duly presented by said Zara Sanna Giovanni, was not paid when presented, and was then dishonored, of which notice was duly given to the trustee herein.

Wherefore, petitioner prays that it be adjudged that petitioner is entitled to, and has a lien upon,

the moneys in the hands of the Trustee for the amount of $1,191.20 with interest thereon from May 19, 1923, superior to any and all rights of the bankrupts, or their Trustee or any other creditor herein, and that the Trustee be decreed to pay said sum with interest to petitioner out of the moneys in his hands.

O'Brien, Boardman, Parker & Fox,
Attorneys for Petitioner,
Office and Post Office Address.
120 Broadway,
New York City. 14

State of New York, }
County of New York, } ss.:

Wm. De Forest Manice, being duly sworn, deposes and says:

That he is a member of the firm of O'Brien, Boardman, Parker & Fox, 120 Broadway, New York City, attorneys for the petitioner herein; that he has read the foregoing amended petition and knows the contents thereof; that the same is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it 15
to be true.

That the sources of deponent's information and the grounds of his belief are communications received by him from petitioner and copies of communications between the bankrupts and petitioner, together with investigations made by deponent and accountants engaged by his firm of the books, records and files of the bankrupts in the possession of the Trustee.

Deponent further says, that the reason why

16 *Stipulation Annexed to Amended Petition.*

this verification is not made by the petitioner and is made by him is that the petitioner is a foreign corporation which does not maintain an office or agent in the State of New York.

WM. DE FOREST MANICE.

Sworn to before me this 20th
day of June, 1924.

WILLIAM H. VOGT,
[SEAL.] Notary Public, Queens County
Queens County No. 1154,
17 Certificate filed in New York Co.
New York Co. Clerk's No. 114,
New York Co. Register's No. 6036,
Commission expires March 30, 1926.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, *et al.*, trading as KNAUTH, NACHOD & KUHNE, 18 Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	In Bankruptcy No. 34996.

WHEREAS, Messrs. O'Brien, Boardman, Parker & Fox, hereinafter called the "Attorneys," are attorneys for, and represent, and may hereafter represent a large number of banks and other

claimants against the above named bankrupts, all of which claimants desire to assert reclamation claims against the estate of said bankrupts, and

WHEREAS, an order has been entered herein providing that all reclamation claims against said bankrupts must be filed on or before June 19, 1924, or be forever barred, and

WHEREAS, the inconvenience of filing a large number of reclamation petitions setting forth individual claims, is recognized by the parties hereto and it is also recognized that a great number of 20
reclamation claims represented by the Attorneys will naturally fall into certain classes capable of being represented by typical reclamation petitions,

NOW, THEREFORE, it is agreed by and between the Attorneys and Middleton S. Borland, Esq., trustee of the bankrupts, hereinafter referred to as the "Trustee," as follows:

1. The attorneys may file with the Special Master and with the trustee herein, prior to June 19, 1924, a reclamation petition or reclamation petitions based upon such claims and pursuant to such legal theories as the attorneys may deem 21
proper or advisable. Such petition or petitions are hereinafter referred to as "typical petitions."

2. With such typical petitions the attorneys may also serve upon the Special Master and the trustee herein, a list of the names of claimants represented by said attorneys with a proper designation after each name appearing on such list stating what part of each claimant's claim falls under each of the typical petitions and there-

22 *Stipulation Annexed to Amended Petition.*

upon the typical petition so designated shall be deemed a petition upon so much of each said claim in favor of such claimant.

3. It is understood that any statements of names, addresses, dates, amounts or other formal information of a similar character contained in the typical petitions, identifying the particular transaction or transactions set forth in the typical petitions, shall not be deemed applicable to the items constituting the claims mentioned on said list, but that in each case the attorneys will supply
23 the receiver on demand with such identifying information applicable to each of the claims mentioned on said list.

4. It is understood, however, that the typical petitions and the designation with respect to each claim heretofore referred to, shall be filed with the trustee and with the Special Master on or before the 19th day of June, 1924, in accordance with the order of the United States District Court duly entered and nothing herein shall be deemed to be a waiver of that requirement.

Dated, New York, June 3, 1924.

24 O'Brien, Boardman, Parker & Fox,
Attorneys.
Middleton S. Borland, Trustee.
By Rosenberg & Ball,
Attorneys.

Stipulation Annexed to Amended Petition. 25

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH, and THEODORE W. KNAUTH, trading as partners under the firm name and style of KNAUTH, NACHOD & KUHNE, and OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON and JOHN R. HALL, individually, Bankrupts, *and* HERBERT B. SMITHERS, MARY W. KNAUTH and THEODORE W. KNAUTH, Alleged Bankrupts.	In Bankruptcy No. 34,996.

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List of claimants represented by Messrs. O'Brien, Boardman, Parker & Fox, attorneys, attached to the foregoing typical petition of the First National Bank of Trinidad, Colorado, pursuant to the stipulation between said Messrs. O'Brien, Boardman, Parker & Fox, attorneys for claimants, and Middleton S. Borland, Trustee in Bankruptcy, herein, dated June 3, 1924, a copy of which stipulation is hereto attached. All of

28 *Stipulation Annexed to Amended Petition.*

each claimants claim falls under the said foregoing typical petition.

	Drafts
Aberdeen National Bank, The, Aberdeen, Wash.	$ 1,141.22
Alexander & Company, Monongahela, Pa.	4,364.50
Alliance First National Bank, Alliance, Ohio	1,061.34
Ambridge Savings & Trust Company, Ambridge, Pa.	1,205.70
American National Bank, Newark, N. J.	971.60
American State Bank of Highland Park, Highland Park, Mich.	4,202.68
Arkansas National Bank, Hot Springs, Ark.	1,940.38
Atlantic National Bank, Atlantic, Iowa	580.32
Atlas Exchange National Bank, Chicago, Ill.	18,777.60
Banca Joseph M. Vigliotti, Detroit, Mich.	2,020.06
29 Bank of Bay Biscayne, Miami, Fla.	694.78
Bank of Detroit, Detroit, Mich.	14,935.39
Bank of Eureka, Eureka, Cal.	6,087.17
Bank of Hamilton, Hamilton, Ontario	4,511.13
Bank of Mill Creek, Mill Creek, W. Va.	849.80
Bank of North America & Trust Company, Philadelphia, Pa.	4,452.13
Bank of Palo Alto, Palo Alto, Cal.	2,295.67
Bank of Watertown, Watertown, Wisc.	119.22
Bank of Wisconsin, Madison, Wisc.	3,372.38
Bernheim, Alfred & Sons, Brooklyn, N. Y. (Oscar Bernheim)	1,608.20
Brattstrom & Company, Seattle, Wash.	309.28
Bridgeport Trust Company, The, Bridgeport, Conn.	1,780.78
Brighton Bank & Trust Company, The, Cincinnati, Ohio	554.51
Citizens & Manufacturers National Bank, Waterbury, Conn.	2,519.55
30 Citizens National Bank, The, Monessen, Pa.	1,919.00
Citizens State Bank, Sheridan, Wyo.	185.90
Citizens Title & Trust Company, Uniontown, Pa.	382.50
Citizens Trust & Savings Bank, Indiana Harbor, Ind.	1,989.77
City Bank, The, Milwaukee, Wisc.	4,449.13
City National Bank, The, Bridgeport, Conn.	5,187.38
City Trust & Savings Bank, Dayton, Ohio	822.50
City Trust & Savings Bank, E. Youngstown, Ohio	6,246.11
Coffman-Dobson Bank & Trust Company, Chehalis, Wash.	530.13
Colonial Trust Company, The, Farrell, Pa.	415.45
Commerce Guardian Trust & Savings Bank, Toledo, Ohio	15,341.52
Commercial National Bank, Los Angeles, Cal.	2,529.51

	Drafts
Commercial National Bank, Youngstown, Ohio	21,898.45
Cuipo, Louis, Perth Amboy, N. J.	1,635.47
Dayton National Bank, Dayton, Ohio	1,799.82
Denver National Bank, The, Denver, Colo.	869.56
Depositors Savings & Trust Co., The, Akron, Ohio	1,593.68
De Santis, Louis—Bank of Canton, Canton, Ohio	13,425.96
Di Claudio, Frank, Jeanette, Pa.	911.00
Dixon Savings Bank, The, Dixon, Iowa	241.41
Drovers Trust & Savings Bank, Chicago, Ill.	1,541.33
Elizabeth Trust Company, Elizabeth, N. J.	913.12
Elyria Savings & Trust Company, The, Elyria, Ohio	6,547.10
Exchange National Bank, The, Spokane, Wash.	584.04
Farmers & Merchants National Bank, Los Angeles, Cal.	7,036.06
Farmers & Merchants National Bank, The, Oakland, Neb.	462.31 32
Farmers National Bank, Beaver Falls, Pa.	1,684.75
Farmers State Bank, Clarkson, Neb.	25.00
Fayette Title & Trust Company, Uniontown, Pa.	6,679.86
Fifth Third National Bank, Cincinnati, Ohio	4,789.25
First National Bank of Brooklyn, Brooklyn, N. Y.	4,983.01
First National Bank, Canton, S. D.	25.20
First National Bank, Chisholm, Minn.	144.45
First National Bank, Christopher, Ill.	2,272.28
First National Bank, Clifton, Kans.	36.26
First National Bank, Denver, Colo.	3,328.40
First National Bank, Ely, Minn.	341.49
First National Bank, Erie, Pa.	6,261.83
First National Bank, Farrell, Pa.	837.08
First National Bank, Gary, Ind.	2,450.86
First National Bank, Hazleton, Pa.	2,240.92
First National Bank, Herrin, Ill.	675.87
First National Bank, Highland Falls, N. Y.	8,063.18 33
First National Bank, Jewell, Iowa	2,023.98
First National Bank of Lansford, Lansford, Pa.	120.84
First National Bank of Logan, Logan, W. Va.	3,196.33
First National Bank of Los Angeles, Los Angeles, Cal.	2,367.03
First National Bank, Missoula, Mont.	5,727.56
First National Bank, Newport News, Va.	521.07
First National Bank, New Salem, Pa.	1,953.00
First National Bank, Philadelphia, Pa.	3,575.91
First National Bank, Roanoke, Va.	1,024.65
First National Bank, Sharon, Pa.	3,002.69
First National Bank, Springfield, Ill.	960.41
First National Bank, Trinidad, Colo.	3,765.09
First National Bank, Two Harbors, Minn.	504.02

34 *Stipulation Annexed to Amended Petition.*

	Drafts
First National Bank, Welch, W. Va.	9,924.37
First National Bank, El Paso, Texas	8,882.17
First National Bank, Gothenburg, Neb.	1,520.46
Fletcher American National Bank, The, Indianapolis, Ind.	726.35
Fourth National Bank, Grand Rapids, Mich	2,808.37
First National Bank, Newman Grove, Neb.	18.18
Gretna Exchange & Savings Bank, Gretna, La.	362.83
Haberfeld, Bernard—All Nations Bank, Rochester, Pa.	1,458.00
Highland Park State Bank, Highland Park, Mich.	23,365.99
Hoboken Trust Company, Hoboken, N. J.	3,014.29
Humboldt Bank, San Francisco, Cal.	5,619.26
Ilasco Supply Company, Ilasco, Mo.	1,948.82
Indiana Harbor National Bank, Indiana Harbor, Ind.	423.83
35 International State Bank, Raton, New Mexico	667.15
Iowa National Bank, Davenport, Iowa	190.40
Ironbound Trust Company, Newark, N. J.	538.25
Jackson State National Bank & State Savings Bank & Trust Company, Jackson, Miss.	3,316.51
Jacobs, Ward W., & Company, Hartford, Conn.	2,326.61
Jefferson Gravois Bank, St. Louis, Mo.	748.45
Johnsonburg National Bank, Johnsonburg, Pa.	508.75
Jubelirer Brothers, Brownsville, Pa.	174.65
Katz, Arnold Company, Philadelphia, Pa.	8,811.92
Klein, H., Bayonne, N. J.	1,574.25
La Grande National Bank, La Grande, Ore.	4,979.94
Liberty Insurance Bank, Louisville, Ky.	4,222.93
Linares & Remigno, Bankers, Paterson, N. J.	3,385.46
Lincoln Alliance Bank, Rochester, N. Y.	804.01
Liberty Savings Bank & Trust Company, Memphis, Tenn.	8,063.53
36 Marine National Bank, Seattle, Wash.	3,174.12
Masontown National Bank, The, Masontown, Pa.	4,511.46
Merchants & Manufacturers Bank, Milwaukee, Wisc.	1,202.34
Merchants & Miners State Bank, Hibbing, Minn.	2,198.26
Merchants & Miners National Bank, Ironwood, Mich.	7,166.07
Merchants National Bank of St. Paul, St. Paul, Minn.	1,089.30
Mid-City Trust & Savings Bank, Chicago, Ill.	11,926.13
Mosser Company, The Louis, Pittsburgh, Pa.	2,203.11
Morelli State Bank, The, Steubenville, Ohio	3,304.37
Mountain Trust Bank, Roanoke, Va.	687.64
National Bank of Commerce, The, Seattle, Wash.	1,291.93
New Britain Trust Company, The, New Britain, Conn.	2,445.42
Norwegian American Line, John T. Moe, Agent, Duluth, Minn.	900.10
Ohio Savings Bank & Trust Co., The, Toledo, Ohio	1,585.37

	Drafts	
Padula, James V., Newark, N. J.	5,850.00	
Passaic National Bank & Trust Co., Passaic, N. J.	1,803.39	
Pecoraro, Gennaro, Italian Banker, Springfield, Mass.	107.60	
Peoples Bank Company, The, Alliance, Ohio	593.49	
Peoples Bank & Savings Co., The, Cincinnati, Ohio	2,036.99	
Peoples National Bank, Ellwood City, Pa.	1,715.74	
Peoples National Bank, Steubenville, Ohio	3,239.20	
Peoples Savings & Trust Company of New Castle, New Castle, Pa.	24,676.66	
Peoples State Bank, The, Gary, Ind.	2,728.55	
Pittsburgh State Bank, Pittsburgh, Pa.	4,694.48	
Putnam Trust Company, Greenwich, Conn.	1,375.59	
Quarter Savings & Trust Company, Wheeling, W. Va.	1,837.00	
Reading National Bank, The, Reading, Pa.	5,549.41	
Red Lodge State Bank, The, Red Lodge, Mont.	67.95	38
Rock Springs National Bank, Rock Springs, Wyo.	2,942.79	
Roth & Son, Joseph, McKeesport, Pa.	3,729.31	
Security State Bank, Omaha, Neb.	2,089.66	
Shigo, John, Freeland, Pa.	176.00	
Shigo, John, Lansford, Pa.	2,997.00	
State Bank of Concrete, Concrete, Wash.	402.00	
State Bank of Grand Island, Grand Island, Neb.	314.25	
State Bank of Lyons, The, Lyons, Colo.	179.64	
State Savings & Trust Company, The, Indianapolis, Ind.	3,514.19	
State Savings Bank & Trust Company, Moline, Ill.	3,494.90	
Steubenville Bank & Trust Company, The, Steubenville, Ohio	616.25	
*Strandberg, McGreevy & Company, Kansas City, Mo.	1,212.76	
Traders Bank, Lexington, Mo.	440.88	
Union Savings Bank & Trust Company, Cincinnati, Ohio	5,276.17	39
Union Savings Bank, Youngstown, Ohio	11,853.77	
United Savings Bank & Trust Company, San Francisco, Cal.	3,848.11	
Vermilion National Bank, Vermilion, S. D.	59.13	
Wallace Bank & Trust Company, Wallace, Idaho	423.07	
Washington Bank & Trust Company, Indianapolis, Ind.	41.05	
Washoe County Bank, Reno, Nev.	975.07	
Wells Fargo Bank & Union Trust Co., San Francisco, Cal.	6,813.82	
Western Bank & Trust Company, Cincinnati, Ohio	1,522.77	
Williamsburg Savings Bank, Brooklyn, N. Y.	2,779.13	
Youngstown State Bank, Youngstown, Ohio	107.60	
	$503,851.99	

*Later withdrawn.

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Answer to Amended Petition.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, trading as co-partners under the firm name and style of KNAUTH, NACHOD & KUHNE and OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, JOHN R. HALL and THEODORE W. KNAUTH, individually, Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	In Bankruptcy. No. 34,996.

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TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MIDDLETON S. BORLAND, as Trustee in Bankruptcy herein, by Rosenberg & Ball, his attorneys, answering the amended petition of the claimant, First National Bank of Trinidad, alleges:

1. That he is without knowledge as to the truth

of any of the allegations contained in paragraphs "4," "5," "6," "7," "8," "9," "10," "11," "12" and "13" of the petition.

WHEREFORE the Trustee prays that an order be entered dismissing the petition with costs.

Dated, New York, October 23, 1924.

ROSENBERG & BALL,
Attorneys for the Trustee,
Office and Post Office Address,
74 Broadway,
Borough of Manhattan, 44
City of New York.

STATE, COUNTY AND CITY OF NEW YORK, } ss.:
Southern District of New York.

MIDDLETON S. BORLAND, being duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

MIDDLETON S. BORLAND.

Sworn to before me this
24th day of October, 1924. 45

ANNA M. MALLOY,
Notary Public 44, New York County
N. Y. Register's No. 6022, Term expires March 30, 1926.

46 **Notice of Hearing to Dismiss Claim.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH, and 47 THEODORE W. KNAUTH, doing business as co-partners under the firm name and style of KNAUTH, NACHOD & KUHNE, and OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL and THEODORE W. KNAUTH, individually, Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	In Bankruptcy. No. 34,996.

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SIRS:

Please take notice that a hearing will be had on the claim filed by you herein before Robert P. Stephenson, Esq., as Special Master, at his office No. 32 Broadway, Borough of Manhattan, City of New York, on the 17th day of September, 1924, at 10:30 o'clock in the forenoon, and a motion will then and there be made to dismiss said claim,

 49

and for such other and further relief as to the Court may seem just and proper.

New York, August 29, 1924.

Yours, etc.,

ROSENBERG & BALL,
Attorneys for Middleton S. Borland, as Trustee,
Office and P. O. Address,
No. 74 Broadway,
Borough of Manhattan, 50
City of New York.

To MESSRS. O'BRIEN, BOARDMAN, PARKER & FOX,
Attorneys for First National Bank of Trinidad, Col.
120 Broadway,
New York City.

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Minutes of Hearing.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK,

In Bankruptcy.

Before ROBERT P. STEPHENSON, Esq., Special Master.

53 In the Matter

of

KNAUTH, NACHOD & KUHNE,
Bankrupts.

32 BROADWAY, NEW YORK CITY,

October 24th, 1924; 10.30 A. M.

HEARING ON RECLAMATION OF FIRST NATIONAL BANK OF TRINIDAD, COLORADO,

Proceeded pursuant to adjournment.

54 MESSRS. ROSENBERG & BALL, Attorneys for Trustee;

BY GODFREY GOLDMARK, Esq., GEORGE G. ERNST, Esq., and RALPH F. COLIN, Esq., Of Counsel.

MESSRS. O'BRIEN, BOARDMAN, PARKER & FOX, Attorneys for Claimant.

BY WILLIAM DE FOREST MANICE, Esq., and GEORGE TROSK, Of Counsel.

ALLEN R. MEMHARD, Esq., Of Counsel for Claimant.

Mr. Memhard.—I would like to call your 55
Honor's attention to the fact that Paragraphs 1, 2 and 3 of the Petition are admitted.

The Master.—But the answer denies Paragraph 8, which realleges Paragraphs 1, 2 and 3 so, as the pleadings stand, the answer denies Paragraphs 1, 2 and 3 so far as they are realleged in the second cause of action.

Mr. Colin.—It is a denial only in so far as it pertains to the allegations of Paragraphs 4 and 5.

Mr. Memhard.—Now, the parties have entered into a stipulation of facts, and I think most of the facts will be stipulated—I will read from the stip- 56
ulation.

It is stipulated that prior to May 1st, 1923, the firm of Knauth, Nachod & Kuhne prepared and distributed a book—

Mr. Goldmark.—But that is not the exact wording of the stipulation.

Mr. Memhard.—Let me tell you the terms of the stipulation, your Honor. We have entered into a stipulation with the following introductory paragraph and the concluding paragraph—the rest relates to the facts which are submitted:

"For the purpose of any trial of the reclamation claim of the First National Bank of Trini- 57
dad, Colorado (hereinafter referred to as the Claimant) the following facts are stipulated to be true, and this stipulation shall be available for use by the Claimant and the Trustee subject to the provisions hereinafter contained."

Then follows a recital of the facts which are stipulated to be true.

Then it concludes with the following:

"All objections to the admission in evidence of any fact or facts hereinabove stipulated are

58 waived except objections on the ground of irrelevancy and/or immateriality."

Then, further: "Nothing in this stipulation shall be deemed to limit the right of either party hereto to offer such other and further testimony and proof herein as that party may be advised, the sole purpose of this stipulation being to avoid the necessity of producing common law evidence to prove the truth of the facts herein stipulated to be true."

Now I am proceeding to offer, on the record, the facts stipulated to be true in the order in which they appear.

59 It is stipulated that prior to May 1st, 1923, the firm of Knauth, Nachod & Kuhne (hereinafter referred to as the bankrupts) prepared and distributed a book known as "List of Foreign Correspondents" among various firms and institutions throughout the United States, including the Claimant; that the copy of the list of foreign correspondents which I hold in my hand is a copy of the said list of foreign correspondents and the provisions of it were in full force and effect—

Mr. Goldmark.—I submit you must offer precisely what I stipulated.

Mr. Memhard.—You stipulated that these facts are true.

60 Mr. Goldmark.—But I don't know whether you are summing up or what you are doing. You have not offered the paragraph which I conceded to be a fact.

Mr. Memhard.—If you will permit me to conclude, you will see what I am offering.

Mr. Goldmark.—You are stating language in the record which is not in the stipulation.

The Master.—I think you had better stick to the stipulation.

Mr. Goldmark.—At this particular point it is

not of great materiality, but we may as well understand what we are doing. 61

Mr. Memhard.—I think if you will let me conclude my statement as to the first paragraph, you will see that there is no difference between us.

Mr. Goldmark.—I will stand on my objection.

The Master.—Sustained, you will have to read the exact stipulation.

Mr. Goldmark.—I ask to have this last part stricken from the record.

The Master.—Yes, strike it out.

Mr. Memhard.—Very well, I will read from the stipulation.

(Reading). Prior to May 1st, 1923, the firm of Knauth, Nachod & Kuhne (hereafter in this stipulation referred to as the bankrupts) prepared and distributed a book known as "List of Foreign Correspondents" among various firms and institutions throughout the United States, including the Claimant. A copy of the said book received by the Claimant has been initialed by the attorneys for the Trustee and the attorneys for the Claimant and constitutes Exhibit 1 hereof. 62

I offer it in evidence.

(Received in evidence and marked Claimant's Exhibit No. 1, October 24th, 1924.)

Mr. Memhard (Continuing reading)—The provisions of said Exhibit 1 were in full force and effect on May 19th, 1923, and so continued until the filing of the petition in bankruptcy herein on or about June 16th, 1923. 63

Now, if your Honor please, I would like to read briefly from some portions of this exhibit because I think they will help your Honor in passing upon the admissibility.

Mr. Goldmark.—I understand that you have now offered in evidence Paragraph 1 of the stipula-

64 tion, plus the exhibit which you have offered in evidence.

Mr. Memhard.—That is correct.

(Mr. Memhard then read from Claimant's Exhibit 1.)

Mr. Memhard.—The portions which I read are referred to as follows: Page 1, first and second paragraphs beginning with "Foreign Exchange to our correspondents," and so forth; page 2, the captions, "Terms and Conditions Governing the use of K. N. & K. Drawing Service," and the two paragraphs following, the two paragraphs of section numbered one; page 3, Section 7; page 4, section 12; page 4, section 13, the first sentence;
65 page 8, section 21, the first sentence; page 13, the caption, "List of Foreign Correspondents" and the next sentence reading, "drawings under our protection must be confined to the following banks."

Mr. Goldmark.—For the sake of clarity, may I call attention to the fact that some of those provisions refer specifically to money orders? I just merely call attention to that fact without arguing its effect.

Mr. Memhard.—Would you care to point out which paragraph?

Mr. Goldmark.—At the top of page 6.

Mr. Colin.—Between pages 6 and 10 the para-
66 graphs refer to money orders and thereafter to cable transfers.

Mr. Memhard.—It is stipulated that prior to May 19th, 1923, the bankrupts prepared and distributed among various firms and institutions throughout the United States, including the Claimant, bound volumes entitled "Foreign Drafts" to be used by such distributees in drawing drafts under and subject to the terms and conditions specified in such volumes entitled "Foreign

Drafts" and in volumes like Exhibit 1 hereof, 67
which is in evidence.

One of said volumes of "Foreign Drafts" received by the Claimant from the bankrupts, and including drafts numbered 61,151 to 61,200 has been initialed by the attorneys for the Trustee and the attorneys for the Claimant and constitutes Exhibit No. 2 hereof, and I offer it in evidence.

(Received in evidence and marked Claimant's Exhibit No. 2, October 24th, 1924.)

Mr. Memhard.—Now I am reading from Exhibit No. 2, the following:

"Foreign Drafts. 68

"The terms and conditions under which our correspondents may use the within forms are contained in our list of foreign correspondents (that is Exhibit No. 1 in evidence) and are subject to change by us from time to time."

Now I will read from the first paragraph: "Upon receipt of advice of draft accompanied by adequate funds payable at par in New Yark, we shall promptly forward our advice of same, and make provision for its payment abroad, provided it is drawn on a bank named in our latest list of correspondents."

Now I will read from the second paragraph: 69
"Under this arrangement our correspondents draw drafts for their own account as principals and our name does not appear, our sole function being to advise the drawees of the issue of drafts drawn by our correspondents and to provide for payment, in which function we act as agents of the drawers."

Now I shall read from the fourth paragraph:

"Further information and instructions are contained in our latest list of foreign correspondents

70 (Exhibit No. 1 in evidence) the provisions of which are hereby referred to and made a part hereof. The use of our facilities will be considered as acceptance of our conditions."

It is stipulated that on May 19, 1923, pursuant and subject to the provisions contained in Exhibits 1 and 2 hereof, which are in evidence, the bankrupts notified the Claimant that the rate for 24,360 Italian Lira on that day would be .0489 per Lire. In fixing the aforesaid rate the bankrupts fixed an amount which was estimated by them to be sufficient to leave them a profit in the transaction.

It is stipulated that pursuant and subject to
71 the provisions contained in Exhibits 1 and 2 and on May 19, 1923, Claimant drew a draft, copy of which is hereto annexed and marked Exhibit 3 hereof.

I offer the draft in evidence, to be marked Exhibit No. 3.

(The draft referred to was received in evidence and marked Claimant's Exhibit No. 3 of October 24, 1924).

Mr. Memhard.—I call your Honor's attention to the fact that that is a draft from Exhibit 2 in evidence as you will note by referring to the Exhibit.

72 It is stipulated that pursuant and subject to the provisions of Exhibits 1 and 2 in evidence, and on May 19, 1923, the Claimant remitted to the bankrupts an "advice," which was one of the forms contained in Exhibit 2 hereof, which is in evidence, a copy of which I hold in my hand and which I offer in evidence as Exhibit No. 4.

(Received in evidence and marked Claimant's Exhibit No. 4 of October 24, 1924).

Mr. Memhard.—With said Exhibit 4, the Claim- 73
ant sent to the bankrupts $1,191.21, which was included in Claimant's check for $3,518.95, a copy of which I hold in hand and which it has been stipulated would be marked Exhibit No. 5—I offer it in evidence.

(Received in evidence and marked Claimant's Exhibit No. 5 of October 24, 1924).

Mr. Memhard.—And which included moneys sent in connection with other advices of the same character.

I call your Honor's attention to the fact that
that is a copy of the form of advice included in 74
Exhibit 2 in evidence.

It is stipulated that the advice and the check, of which Exhibits 4 and 5 in evidence are copies, were received by the bankrupts on May 22, 1923, and receipt thereof was acknowledged to the Claimant. Said check was duly deposited by the bankrupts in their general checking account in the Guaranty Trust Company of New York on May 22, 1923, and the bankrupts received credit for the amount thereof with the Guaranty Trust Company on that date.

It is stipulated that on or about May 22, 1923,
the bankrupts mailed to the Banca Commerciale 75
Italiana at its Genoa office six papers which constituted a document known as "S S 8469-B." The papers which I hold in my hand are copies of the six papers and I offer them in evidence to be marked Exhibits Nos. 6, 6-A, 6-B, 6-C, 6-D and 6-E.

(Received in evidence and marked Claimant's Exhibit Nos. 6, 6-A, 6-B, 6-C, 6-D and 6-E of October 24, 1924).

76 Mr. Memhard.—And that at the same time there was mailed to the Banca Commerciale Italiana at its Sassari branch a duplicate of the paper copy of which is in evidence and is marked Exhibit 6-D. These papers were received by the Banca Commerciale Italiana on or before June 4, 1923.

Now it may aid your Honor, with the approval of the other side, to call attention to some of the mechanics of that. They are all part of the same document which has been described as SS 8469-B— the bankrupts call that, I think, the Steamer Block. Exhibit 6, you will note, is a summary or list of the totals of the figures appearing on

77 each of the following Exhibits.

You will notice that Exhibit 6 has the total 197,508.60 and that it is made up of the totals which appear in the following Exhibits, 6-A to 6-E; and the copy of 6-D, which was mailed to the Sassari branch of the Banca Commerciale Italiana, includes draft No. 61,161 drawn by the First National Bank of Trinidad, Colorado, dated May 19th, for 24,360 Lire in favor of Zara Sanna Giovanni, and that the draft to which I call attention is the draft in suit.

Now will your Honor note that these papers are a direction by the bankrupts to the Banca Commerciale Italiana to "Protect to the debit of

78 our account" the draft set forth, and to "Charge the same to the bankrupts' account."

Mr. Goldmark.—If you are going to do that, you may as well call attention to the bottom of Exhibit 6-D, which relates to the same draft.

The Master.—That says "Please honor the above list of drafts," and so forth.

Mr. Memhard.—Well, you may have that on the record.

It is stipulated that the Banca Commerciale Italiana sent to the bankrupts through the mail,

and the bankrupts or the receiver received on or about June 16, 1923, June 25, 1923, and July 5, 1923, respectively, the papers which I hold in my hand and which I offer in evidence to be marked Exhibit Nos. 7, 8 and 9. 79

Mr. Goldmark.—To those papers I object on the ground that they are irrelevant and immaterial—our advices from the Banca Commerciale Italiana to the bankrupts are irrelevant and immaterial. We shall be glad to have counsel, for the aid of the Court and myself, point out in what way he deems communications which we received from the Banca Commerciale Italiana with respect to fixing any rights of the Claimant relevant.

Mr. Memhard.—The trustee stipulates, later, that this method of dealing, of sending statements and of charging the account was approved. 80

Mr. Goldmark.—I stipulated nothing so far as direction is concerned, except what is already in evidence.

Mr. Memhard.—I think the Exhibit should be admitted in evidence. Let me read the rest of the stipulation.

Mr. Goldmark.—Is the offer now withdrawn temporarily or is he offering a further stipulation, or what?

The Master.—I suppose it is still pending.

Mr. Memhard.—Let me conclude the stipulation, if you will— 81

And that statements of the type of Exhibits 7, 8 and 9 were sent by Banca Commerciale Italiana to the bankrupts approximately each week.

Mr. Goldmark.—I object to that for the same reason.

Mr. Memhard.—Won't you let me finish that paragraph?

The Master.—Let him finish the paragraph.

Mr. Memhard.—The practice of Banca Commerciale Italiana in debiting the bankrupts with the

82 amounts of drafts advised, as shown on these statements, was recognized as proper by the bankrupts.

Now I offer these papers in evidence to be marked Exhibits Nos. 7, 8 and 9.

Mr. Goldmark.—I press my objection that they are irrelevant and immaterial and inadmissible. There is nothing here to show that they have any relevancy to the issues which is being tried between the Claimant and the bankrupts or its trustee.

The Master.—But there is a further stipulation to the effect that this practice was recognized by the bankrupts as proper.

83 Mr. Goldmark.—I don't see the relevancy of that as between the Claimant and the bankrupts. If he indicates what the relevancy is, we may get somewhere, but I do not see the relevancy between the Claimant and the bankrupt.

Mr. Memhard.—Well, Exhibit 8 shows the reference to the Steamer Block S S 8469 B, 197,508.60 Lire, which is already in evidence and which is the amount which included the amount of the draft of the Claimant drawn on that bank, and this shows that the bankrupt, in furtherance of its service, advised the foreign bank, as it said it would do, and provided the money as it said it

84 would do.

Mr. Goldmark.—This doesn't show that. I let the advices go into evidence without objection, but this is not the advice that you are offering.

Mr. Memhard.—And it shows that the bank debited the account of Knauth, Nachod & Kuhne with that total, which included the draft in suit.

One of the questions in the case is whether there was an equitable assignment abroad, and this shows how they regarded their relations and what they did in furtherance of them, and the three

statements cover the period which connect up the totals, with the ultimate transfer of the balance to the trustee. 85

The Master.—I am wondering how that can affect the arrangement between Knauth, Nachod & Kuhne and the Claimant, what the bank in Italy did.

Mr. Memhard.—Because the bankrupt undertook to do certain things and we claim an equitable assignment of the funds abroad, and that statement shows that they debited the account of the bankrupts and credited something else, and we rely upon that to show what the bankrupts did in furtherance of its agreement with the Claimant. Without that, we cannot show what they did 86
in furtherance, and we must show that the money came back into the hands of the trustee. Without that we shall be unable to show that that money came back to the trustee.

The Master.—I will admit them for the present and I will hear further argument as to whether they should be stricken out.

Mr. Goldmark.—I respectfully except.

(Received in evidence and marked Claimant's Exhibits Nos 7, 8 and 9 of October 24, 1924).

Mr. Memhard.—I would like to call your 87
Honor's attention, with relation to these exhibits, to the fact that they show that in carrying the account of the bankrupts from week to week, the amount of drafts advised abroad were charged against the account as soon as the Banca Commerciale Italiana received advice of the draft and without waiting for the draft to be presented or paid, and also that Exhibit 9, which is a statement covering the period up to the date of the filing

88 of the petition in bankruptcy, shows that at no time prior to the bankruptcy was the amount of S. S. Steamer Block 8469 B, credited back to the account of the bankrupts.

The Master.—This Exhibit 9, is that 15th of June?

Mr. Memhard.—Up to the 16th of June, that is the date of bankruptcy.

The Master.—I don't know whether that is fifteen or sixteen.

Mr. Memhard.—I think it will be conceded that that is the 16th.

Mr. Colin.—It is conceded that it is the 16th.

89 Mr. Memhard.—I would like to have it noted on the record that what immediately follows relates to paragraph 9 of the stipulation.

It is stipulated that when the Banca Commerciale Italiana at Genoa, received the papers in the form of Exhibits 6 to 6-E in evidence, said Banca Commerciale Italiana thereon debited an account which the bankrupts maintained with said bank at its Genoa office to the extent of the aggregate amount of the drafts referred to in Exhibit 6 in evidence, and simultaneously credited on its books an account termed "Drafts Payable," in which account were also credited amounts of drafts advised to the said Banca Com-

90 merciale Italiana for the payment by other depositors or clients of the Banca Commerciale Italiana in addition to the bankrupts.

Mr. Goldmark.—If your Honor please, in view of your ruling with regard to Exhibits Nos. 7, 8 and 9, I do not object to that statement but I reserve the right to move to strike it out in the event that you subsequently determine to strike out the exhibits.

The Master.—You do object to it, is that what you mean?

Mr. Memhard.—Let me conclude my statement. 91
Mr. Goldmark.—To make myself perfectly clear, what I mean is that in the present state of the record I am not objecting to it, but in the event that you strike out those other exhibits, then this testimony may also become incompetent.

Mr. Memhard.—Let me finish my sentence.

The Master.—Finish your paragraph and I will see.

Mr. Memhard.—I would like to have this on the record in complete sequence, I would like to read it again.

It is stipulated that when the Banca Commerciale Italiana at Genoa received the papers in the form of Exhibits 6 to 6-E in evidence, said 92
Banca Commerciale Italiana thereupon debited an account which the bankrupts maintained with the bank at its Genoa office to the extent of the aggregate amount of the drafts referred to in Exhibit 6 in evidence, and simultaneously credited on its books, an account termed, "Drafts Payable," in which account were also credited amounts of drafts advised to the said Banca Commerciale Italiana for payment by other depositors or clients of the Banca Commerciale Italiana in addition to the bankrupts. Interest was allowed to the bankrupts on the amount of the balance standing to their general credit, but no interest was allowed to the bankrupts or to anyone else upon 93
the amount credited to the account termed, "Drafts Payable," as a result of advices from the bankrupts. The Banca Commerciale Italiana received no compensation or commission for their services in honoring drafts drawn upon them by the bankrupts, or by their correspondents pursuant and subject to the provisions of Exhibits 1 and 2 in evidence, except such compensation if any, as was measured by the use, without the payment of interest thereon, by said Banca Com-

94 merciale Italiana, of the funds standing to the credit of the account termed "Drafts Payable."

Mr. Goldmark.—Now may I repeat my statement that, in the present state of the record, I do not object to paragraph 9 of the stipulation which has just been read by counsel, but I do reserve the right, in the event that you strike out Exhibits Nos. 7, 8 and 9, to move to strike it out.

Mr. Memhard.—If your Honor please, this paragraph, as stipulated, has nothing whatever to do with the other. This is stipulated to be true, stipulated as a fact.

Mr. Goldmark.—I am talking about the materiality. I think I have made myself clear.

95 The Master.—That motion may be reserved.

Mr. Memhard.—Please note on the record that what I am reading now refers to paragarph 12, of the stipulation:

It is stipulated that on June 16th, 1923, the Receiver herein sent a cablegram to the Banca Commerciale Italiana at Genoa, Italy, copy of which I hold in my hand and offer in evidence as Exhibit No. 10.

(Received in evidence and marked Claimant's Exhibit No. 10, October 24, 1924).

96 Mr. Memhard.—Please note on the record that what I am reading now refers to paragraph 13 of the stipulation:

It is stipulated that on July 5, 1923, the Receiver received from Banca Commerciale Italiana, a letter dated June 22, 1923, together with enclosures therein referred to, and that Exhibit No. 9 in evidence was one of the enclosures and the paper I have in my hand is a copy of the letter itself, which I offer in evidence as Exhibit No. 11.

Mr. Goldmark.—I make the same objection to 97
that.

(Received in evidence and marked Claimant's Exhibit No. 11, October 24, 1924).

Mr. Memhard.—This exhibit shows that in arriving at the balance in the bankrupts' favor, the net amount, after deducting from the general balance, the amount of all drafts advised, was taken. This amount is arrived at on Exhibit 9 to which I referred, after deducting all drafts advised.

Now I would like to read the last paragraph on the second page of the letter, Exhibit 11, in evidence: 98

"We enclose herewith a statement of the account of Messrs. Knauth, Nachod & Kuhne as at the close of business on the 16th inst. (That is June 16th) showing, in principal only, a balance in their favor of:

Lit. 89. 351,26=from which is to be deducted an approximate sum of:

Lit. 8. 954,00=debit balance Dollars Account. ($407.15) leaving a balance of:

Lit. 78. 397,26.

With reference to Exhibit 9, your Honor will note that this balance is arrived at by deducting the drafts advised to the bank, and I would like 99
to read from page 2 of the letter Exhibit 11, the following:

"During the last few days several drafts already debited in account have been presented, the payment of which we have refused, and would ask you to inform us by cable whether we are to pay drafts which have already been passed to the debit of the account or whether we are to consider them as cancelled and re-credit them to the account of Messrs. Knauth, Nachod & Kuhne."

100 I would also like to read the following paragraph from page 2 of Exhibit 11 in evidence:

"We would ask you further to note that the following orders are being held in abeyance, not having been debited to the account through lack of funds."

Then follows a list of orders aggregating several hundred thousand Lire.

I would like to point out that that apparently indicates that when they didn't have a balance, they did not credit the drafts payable account.

I would like to have it noted on the record that what I am reading now refers to paragraph 14 of the stipulation:

101 It is stipulated that the following Cablegrams and letters passed between the receiver and the Banca Commerciale Italiana;

Cablegram June 26, 1923, the receiver to Banca Commerciale Italiana;

Cablegram received June 30, 1923, Banca Commerciale Italiana to the receiver;

Letter June 29, 1923, receiver to Banca Commerciale Italiana;

Letter July 12, 1923, Banca Commerciale Italiana to receiver;

Cablegram received July 13, 1923, Banca Commerciale Italiana to receiver;

102 Cablegram July 13, 1923, receiver to Banca Commerciale Italiana;

Cablegram August 23, 1923, receiver to Banca Commerciale Italiana.

Photostatic copies of the aforesaid letters and cablegrams are hereto annexed and marked Exhibits 12, 13, 14, 15, 16, 17 and 18 respectively.

(Cablegram June 26, 1923, receiver to Banca Commerciale Italiana received in evidence and marked Claimant's Exhibit No. 12 of October 24, 1924).

(Letter June 29, 1923, receiver to Banca Commerciale Italiana received in evidence and marked Claimant's Exhibit No. 14 of October 24, 1924). 103

(Cablegram received June 30, 1923, Banca Commerciale Italiana to receiver, received in evidence and marked Claimant's Exhibit No. 13 of October 24, 1924).

(Letter of July 12, 1923, Banca Commerciale Italiana to receiver, received in evidence and marked Claimant's Exhibit No. 15 of October 24, 1924).

(Cablegram received July 13, 1923, Banca Commerciale Italiana to receiver, received in evidence and marked Claimant's Exhibit No. 16 of October 24, 1924). 104

(Cablegram July 13, 1923, receiver to Banca Commerciale Italiana, received in evidence and marked Claimant's Exhibit No. 17 of October 24, 1924).

(Cablegram of August 23, 1923, receiver to Banca Commerciale Italiana, received in evidence and marked Claimant's Exhibit No. 18 of October 24, 1924).

Mr. Memhard.—Referring to Exhibit 14, permit me to call your Honor's attention to the last paragraph of this letter, in which the receiver directs Banca Commerciale Italiana to rule off the account of the bankrupts on the day Banca Commerciale Italiana got a cable of June 16th, which is Exhibit 10. It reads as follows: 105

"I request you to kindly rule off the account of Knauth, Nachod & Kuhne on the day on which my first cable (confirmation enclosed) informing you of the receivership reached you, and to forward to me by return mail a statement of their account up to that date, as well as a list of all unexecuted cable transfers and unpaid drafts and

106 money orders, stating the numbers of reports in which items were advised by Knauth, Nachod & Kuhne."

Referring to Exhibit 15, beginning the last paragraph, I read from the bottom of page one:

"We would further refer you to our letter of June 22nd, in which we desired you to advise us by cable whether we are to pay drafts which have already been passed to the debit of the account or whether we are to consider them as cancelled and to re-credit to the account of Messrs. K. N. & K."

Let me read Exhibit 17 (Counsel reads same).

And I would like to have the record note that
107 what I am reading now refers to paragraph 15 of the stipulation:

It is stipulated that on September 26, 1923, the Receiver received from the Banca Commerciale Italiana, a letter dated September 10, 1923, together with enclosures, copy of which letter and enclosures are annexed hereto and marked Exhibits Nos. 19, 19-A and 19-B, respectively, and I offer them in evidence.

(Received in evidence and marked respectively Claimant's Exhibits Nos. 19, 19-A and 19-B).

Mr. Memhard.—Referring to Exhibit 19, I
108 should like to read the second paragraph of that letter of September 10th, reading as follows:

"Information has now been received from all our branches regarding unpaid drafts and we enclose herewith statement of drafts which had been debited but not paid prior to the appointment of the Receivership."

Now with regard to Exhibit 19-A, which is the list of unpaid drafts referred to in Exhibit 19, the letter of September 10th, I would like to call

attention to the fact that the draft in suit is specified in that list; that is, draft No. 61,161, which is Exhibit 3 in evidence, drawn by the First National Bank of Trinidad, Colorado, on, as they say, "Our Sassari Office," for Italian Lire 24,360. 109

Now I would like to point out that the total of all the drafts charged and unpaid, as shown on the statement enclosed, being Exhibit 19-A, including the draft in suit, was 1,526,048.48 Lire, which corresponds with the amount shown in the letter, Exhibit 19, and in the statement of account, Exhibit 19-B, as having been recredited to the account of the bankrupts; and also that in the statement reference is made to the letter of September 10, 1923. 110

If your Honor will note on the right hand side, where that total of 1,526,048.48 Lire appears, you will see reference to the letter of September 10th.

I would also like to point out, that in the letter the Banca Commerciale Italiana advised the Receiver that it has passed telegraphic instructions to its New York Agency to pay him an amount, which as shown by the statement, Exhibit 19-B, included the amount recredited on account of all unpaid drafts, including the draft of the claimant.

Now I would like to have it noted on the record that what I am reading refers to paragraph 16 of the stipulation. 111

It is stipulated that the Receiver and/or Trustee has received from the Banca Commerciale Italiana $67,548.06, being the amount of 1,629,550 Lire, less $4,115, referred to in Exhibits 19 and 19-B, in evidence, converted into American dollars.

For the convenience of the Master I would like to point out the fact that 1,629,550 Lire is 1,629,-

112 770 less 220 Lire for cable expenses mentioned in Exhibit 19, and includes the sum of 1,526,048.48 Lire recredited to the account of the bankrupts—that appears on Exhibit 19-B.

Referring to Exhibit 19, the total credit carried forward on Exhibit 19-B, is the total credit carried forward from Exhibit 9, namely, 51,825,703.14 Lire, and that the debit total carried forward to Exhibit 19-B is 51,738,351.88, which is the total of debits on Exhibit 9, namely, 51,825,703.14, less the amount brought down as a credit balance, namely, 87,351.26 Lire. That will help your Honor connect up those statements.

113 Now I would like to have it noted on the record that what I am reading refers to paragraph 17 of the stipulation:

It is stipulated that the aforesaid draft, Exhibit 3 in evidence, was duly presented for payment and payment thereof was refused and notice thereof duly given to the Receiver and to the Trustee. The draft still remains unpaid.

Mr. Trosk.—I think the record ought to show that the original draft is in the possession of the claimant and is ready to be surrendered or delivered up to the Trustee.

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114 Hearing adjourned to October 24, 1924, at 2:00 P. M.

UNITED STATES DISTRICT COURT, 115

SOUTHERN DISTRICT OF NEW YORK,

In Bankruptcy.

Before ROBERT P. STEPHENSON, ESQ., Special Master.

In the Matter
of
KNAUTH, NACHOD & KUHNE,
Bankrupts. 116

32 BROADWAY, NEW YORK CITY,
October 24th, 1924; 2.00 P. M.

HEARING ON RECLAMATION OF FIRST NATIONAL BANK OF TRINIDAD, COLORADO.

Proceeded pursuant to adjournment.

MESSRS. ROSENBERG & BALL, Attorneys for Trustee.
BY GODFREY GOLDMARK, ESQ., GEORGE G. ERNST, ESQ., and RALPH F. COLIN, ESQ., Of Counsel. 117
MESSRS. O'BRIEN, BOARDMAN, PARKER & FOX, Attorneys for Claimant.
BY GEORGE TROSK, ESQ., and WILLIAM DE-FOREST MANICE, ESQ., Of Counsel.
ALLEN R. MEMHARD, ESQ., Of Counsel for Claimant.

Mr. Memhard.—I would like to state, with reference to some objections made when I read the

stipulation into the record in language slightly different from the written stipulation, that I was seeking to avoid the use of the words, "Hereto Annexed," by saying, "Which I hold in my hand," because the words, "Hereto Annexed," had no meaning.

Now I hold the original of draft 61,161 and offer to surrender it up to the Trustee for whatever value or purpose the Master may attach to it.

I would like to call attention to the fact that this action is not on the draft. The draft is one by the Claimant on the Banca Commerciale Italiana
119 and has no relation to the bankrupt; the bankrupt's name nowhere appears on the draft and a copy of it is already in evidence.

Now I would like to call Mr. Schulze.

Otto H. Schulze, called as a witness on behalf of the Claimant, being duly sworn, testified as follows:

Direct-examination by Mr. Memhard:

Q. Will you give your address, Mr. Schulze? A. 74 Broadway.

120 Q. You are employed by the Trustee in Bankruptcy of Knauth, Nachod & Kuhne? A. I am.

Q. And prior to that employment you were employed by the receiver? A. Yes.

Q. And prior to that employment you were employed by the bankrupts? A. I was.

Q. For how long? A. From May, 1920.

Q. To the date of bankruptcy? A. Yes, sir.

Q. In what capacity were you employed by the bankrupts? A. General auditor.

Q. And in that connection you had access to all the books and records of the bankrupt? A. I did.

Q. And audited all of its transactions as shown by the books? A. Yes, sir.

Q. Did you have to do with the auditing or examining of any transactions other than those shown in the books? A. Well, my work consisted of other work than auditing—I don't know how to answer your question.

Q. As far as your duties as auditor were concerned? A. Well, it may go back further than just auditing records. I was in charge of the various departments, to see that they functioned properly, in order that their records might tie in with the general records. 122

Q. That was part of your duty? A. Yes, sir.

Q. And since your employment by the receiver and trustee you have had the same access to all the books and records that you had prior to the bankruptcy? A. I have, yes, sir.

Q. Can you produce any book or record, other than the office copy of Steamer Block number 8469-B, which contains reference, by name and date and amount of drafts, to the draft in suit here, that is, the one drawn by the Trinidad Bank of Colorado, the Claimant, No. 61,161. Is that clear? A. I don't think it is quite clear. You mean showing the name and number—will you just read the question? 123

Q (Read)? A. No.

Q. And you cannot produce any such record because you have no such record, is that so? A. That is so.

Q. After the bankrupt received, from the Claimant here—you understand the Claimant is the Trinidad Bank? A. Yes, sir.

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Q. The dollar equivalent of the twenty-four thousand three hundred and sixty Lire, did the bankrupt carry on its books of account, as a liability, the money it received from the Trinidad Bank?

Mr. Goldmark.—I object to that as calling for a conclusion. He may show what the books showed.

The Master.—Sustained.

Mr. Memhard.—He testified that he was an auditor and employed as such for a number of years and had charge of all the
125 records of account of the bankrupt, and I submit he is qualified as an expert to answer that question.

Mr. Goldmark.—It is not a question of expert testimony, it is a question of law.

The Master.—You asked him what the books showed—that is secondary evidence.

Q. Is there any book which contains an account with the First National Bank of Trinidad, Colorado, or any reference to the First National Bank of Trinidad, Colorado, other than the office copy of the Steamer Block? A. Yes, there is a record.

Q. What is it? A. It is a record for what we
126 call a bill ledger, in which record—you want me to explain?

The Master.—No, you have answered the question.

Q. Is that the only record? A. That is the only record.

Q. Will you produce that book? A. I haven't it right here.

Q. Is there any book in which the bankrupt carried as a liability, the amount of money received

from the First National Bank of Trinidad, Colorado, in connection with this draft No. 61,161?

Mr. Goldmark.—I make the same objection to that and add to it the objection that the use of the term "book" nowadays is a very indefinite one.

Mr. Memhard.—Well, book or record.

Mr. Goldmark.—I make the same objection.

The Master.—I sustain the objection.

Mr. Memhard.—I ask to have an exception to the ruling and to the preceding one. 128

The Master.—Exception noted.

Q. The other record you describe as a bill ledger record? A. Yes, sir.

Q. Was that a record in which you kept a record of differences or minor adjustments which were to be made between the bankrupt and a drawer under the drawing service, Exhibit No. 1? A. That is true.

Q. It had no other function than merely that it contained a record of such minor adjustments as sometimes arose in connection with the transaction? A. That is right.

Q. The bankrupt carried, on its books, an account with the Banca Commerciale Italiana, Genoa, Italy? A. Yes, sir. 129

Q. Were entries made in that account of the amounts of Lire mentioned in Steamer Block letters? A. Yes, sir.

Q. And those entries charged or credited the Banca Commerciale Italiana with the amounts of the Steamer Block letters? A. Yes, sir.

Q. Which was it? A. Credited.

Q. Did the bankrupt, after crediting the Banca

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Commerciale Italiana with the amounts of Lire advised in Steamer Block letters, thereafter ever treat the amounts of such lire as an asset?

Mr. Goldmark.—I object to that as calling for a conclusion.

Mr. Memhard.—On their books.

The Master.—What is the objection?

Mr. Goldmark.—If they ever treat it as an asset—I don't know what he means.

Mr. Memhard.—I said on their books. It is perfectly obvious that we must allow
131 some recognition of these terms in connection with bookkeeping and financial transactions, otherwise we get nowhere.

The Master.—Do you object on the ground the books are not here?

Mr. Goldmark.—No. I don't object on the ground the books are not here.

The Master.—You have no objection to this witness testifying to what the books show without their being present?

Mr. Goldmark.—No.

The Master.—Then I will overrule the objection.

132 Mr. Goldmark.—Exception.

Q. (Read as follows): Did the bankrupt, after crediting the Banca Commerciale Italiana with the amounts of Lire advised in Steamer Block letters, thereafter ever treat the amounts of such Lire as an asset on their books? A. No.

Q. What became of the money which was received by the bankrupts from the First National Bank of Trinidad, Colorado?

Mr. Memhard.—I will withdraw that question.

Q. Upon receipt from the First National Bank of Trinidad, Colorado, of the check which is Claimant's Exhibit No. 5 in evidence, for $3,518.95, was that check deposited in one of the bank accounts of the bankrupt? A. According to this Exhibit 5, it was deposited in the Guaranty Trust Company.

Q. Was the First National Bank of Trinidad, Colorado, credited, anywhere, in any book or record with that amount of money? A. No.

Q. Was any record set up in the bankrupt's books, or an entry made showing an indebtedness by the bankrupt of that amount of money to the 134
First National Bank of Trinidad, Colorado?

Mr. Goldmark.—That is the same question I objected to before.

The Master.—Showing a liability?

Mr. Goldmark.—He now uses the word "Indebtedness"; I don't know that there is any distinction.

Mr. Memhard.—I submit that some latitude must be allowed with regard to the meaning of terms everyone understands.

The Master.—Why not ask him what the books show?

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Mr. Memhard.—I am trying to get at it. You appreciate that this man is in the bankrupt's employ, or rather in the trustee's employ.

The Master.—Oh, yes.

Mr. Goldmark.—He has already shown what the books show; that is, he has shown it in part, perhaps, but now he is trying to go beyond that.

Mr. Memhard.—If we should bring here

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all the books and records, that would be one thing. But we could simplify this a great deal by asking this man some simple questions because he is a competent expert in their employ.

The Master.—Let me hear the question.

Q. (Read).

The Master.—I sustain the objection.

Mr. Memhard.—I respectfully except.

Q. Now the bankrupt was indebted to various
137 persons, was it not, during this period from May 19th to the date of bankruptcy? A. It was.

Q. And wasn't that indebtedness set up as a liability on the books of the bankrupt? A. No, not all of it.

Q. Did the books of the bankrupt contain accounts with persons to whom it was indebted? A. It did.

Q. And that indebtedness was a liability, was it not? A. Yes.

Q. And did not the books of the bankrupt show, either in detail or in the aggregate, all of its liabilities?

138 Mr. Goldmark.—I object to that as calling for a conclusion. I don't see how this man can pass on the question of whether or not the books showed liabilities of the bankrupt.

The Master.—He may be able to tell, I will overrule the objection.

A. I can't answer that question.

Q. Well you were the auditor, were you not? A. Yes.

Q. And the books were kept under your direction, were they not? A. Yes.

Q. And they were supposed to have been kept correctly? A. Yes.

Q. It was your duty to know that they were kept correctly, was it not? A. Yes.

Q. Then why can't you answer the question? A. Well, there were various suits pending against Knauth, Nachod & Kuhne that were not set up on the books as liabilities and afterwards turned out to be liabilities.

Q. You refer in general to unliquidated liabilities or obligations? A. Yes. 140

Q. But as to all definitely known transactions and liabilities, were they all reflected in the books and records? A. They were reflected on the records with the exception of when it was made out in balance sheet form, then net positions were taken and the liabilities were not shown or were the assets shown, in such transactions.

Q. But no cash ever came into the business that was not shown on the books? A. No, sir.

Q. And those balance sheets showed aggregate liabilities did they not? A. Aggregate net liabilities and net assets.

Q. After May 19, 1923, were the balance sheets taken off from the books of the bankrupt? A. 141 Yes, sir.

Q. On what date? A. May 31st—that is, at the end of May, 1923.

Q. And when subsequently? A. Then one as of June 15th, the date of bankruptcy.

Q. Referring to the Steamer Block, Exhibit 6 to 6-E, you will note, with reference particularly to Exhibit 6-D, the amount of the draft drawn by the claimant here, of 24,360 Lire? A. Yes.

Q. And I will tell you that it has been stipu-

lated here that the money to cover that draft was $1,191.21, and that that $1,191.21 was included in the check for $3,518.95.

Q. What was the date on which the bankrupt received advices from the Banca Commerciale Italiana that that Steamer Block had been received? A. What is the date?

Q. The bankrupt received advices from the Banca Commerciale Italiana from time to time acknowledging receipt of Steamer Blocks? A. Yes.

Q. And in the statements which the bankrupt
143 received from the Banca Commerciale Italiana it showed debit items corresponding to the amounts of the Steamer Blocks? A. Yes.

Q. Now you will note there, by reference to Exhibit 8, that the amount of this Steamer Block, 197,508.60 Lire was charged on June 4th—do you see that? A. Yes, sir.

Q. That indicates to you, does it not, that on May 30th the Banca Commerciale Italiana had not received that Steamer Block? A. I don't know, I can't tell that.

Q. I mean if they charged it on June 4th, they evidently had not received it on May 30th. A. I don't know.

144 Mr. Goldmark.—That is purely speculative.

Q. I asked if it indicated that? A. You have the dates so close that I really can't tell.

Q. Well what was the date of the Steamer Block? A. Somewheres around the 19th, I am not sure.

Q. I will tell you that it was May 22nd? A. May 22nd, yes, sir.

Q. And what appears from Exhibit 8 there to

be the date on which the Banca Commerciale Italiana charged that amount as shown in the Steamer Block? A. June 4th, value-dated June 2nd; in other words, they made the entry on June 4th, but charged us as of June 2nd.

Q. Now the bankrupt you said prepared a trial balance as of May 30th? A. Yes, sir.

Q. And that trial balance included the net assets and net liabilities of the bankrupt on that date? A. Yes, sir.

Q. That trial balance was prepared from the books of the bankrupt? A. Yes, sir.

Q. Did that trial balance include, as a liability, 146
the amount of money which had been paid to the bankrupt by the First National Bank of Trinidad for this draft in suit?

Mr. Goldmark.—Objected to as incompetent, irrelevant and immaterial and in addition, not binding on the trustee.

The Master.—Sustained.

Mr. Memhard.—Of course, the trustee stands in the same position as the bankrupt here.

The Master.—Yes, but evidence which is admissible against the bankrupt is not necessarily admissible against the trustee. 147

Mr. Memhard.—But the rights of the parties are being determined, in part, by the records of the bankrupt which are now in possession of the trustee and I am showing what the records were at the time, and this man was the auditor at the time this transaction occurred.

The Master.—These records are only admissible against the parties to the proceeding. If Knauth, Nachod & Kuhne were a

party to the proceeding, that would be admissible. The trustee is a party to the proceeding and they are not his records.

Mr. Memhard.—Excepting that, in line with the position that your Honor indicates, we are attempting to show the relationship which existed between the Claimant and the bankrupt, Knauth, Nachod & Kuhne, and we must show, by their records, what took place after the receipt, by the bankrupt, of the money which we paid to the bankrupt for a particular purpose. Now
149 our petition alleges that it was an equitable assignment in favor of the Claimant in a fund abroad and it is material, in that connection, to show that the bankrupt, after the receipt of this money from the Claimant and the advice of it abroad and the debiting of the account of the bankrupt with the foreign bank, the Banca Commerciale Italiana, never thereafter treated that money as a liability to the drawer, the First National Bank of Trinidad, or never treated the money advised abroad as an asset of its own.

150 I submit that I must show that from the bankrupt's books and, unless I can show that, I am excluded from proving my case because my case rests largely on that record.

Mr. Goldmark.—On the theory that counsel advances, when I take a trial balance, having sent a check to X. Y. Z. in payment of an indebtedness and take that off from the asset side, that would constitute an

equitable assignment of my bank balance which I do not believe he contends.

Mr. Memhard.—Nothing of the kind.

The Master.—Let us not get into that argument. Of course, you must first prove that these books were accurate before you can put them in evidence.

Mr. Memhard.—I think it has been testified to that they were completely and accurately kept—he so testified.

The Master.—He did not testify that the trial balance was correct, did he?

Mr. Memhard.—I will ask him. 152

Q. Was the trial balance correct? A. It was correct as far as our records went.

Q. The trial balance you said was taken from your books? A. The trial balance was taken from the books.

Q. And your books were accurately and correctly kept under your supervision? A. Yes.

Q. Was that trial balance a true and correct trial balance or did you leave something out of it? A. No.

Q. Then it was a true and correct trial balance? A. Of the books, yes, sir. 153

Q. And the books correctly reflected your assets and liabilities, did they not? A. Well, I can't answer that.

Q. With the exception as you previously stated? A. No, not only with that exception but, as you understand, the books that we kept in New York were not the actual conditions of the books that were kept abroad.

Q. I am not talking about anything that hap-

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pened outside of your books, please don't argue about it.

Mr. Goldmark.—He is entitled to make his explanation.

Q. I am asking you if the trial balance was a true and correct trial balance? A. But you also asked me if the assets and liabilities reflected thereon were the true assets and liabilities, and I can't answer that.

Q. Well so far as you know, the books were truly and correctly kept, were they not? A. Yes,
155 sir.

Q. And so far as you know that trial balance was a true and correct one according to the books? A. According to the books, yes, sir.

Q. And you were the auditor in charge of all the books and records, were you not? A. Yes, sir.

Mr. Memhard.—Now I press my former question.

The Master.—What was the question?

Q. (Read as follows).—Did that trial balance include, as a liability, the amount of money which had been paid to the bankrupt by the First Na-
156 tional Bank of Trinidad for this draft in suit?

The Master.—Do you mean to object on the ground the original trial balance is not produced?

Mr. Goldmark.—I do not.

The Master.—Then I overrule the objection.

Mr. Goldmark.—Exception.

Q. Does that trial balance include, as an asset, the amount of Lire advised to Banca Commerciale

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Italiana in the Steamer Block in question, namely 197,508.60 Lire? A. I don't think I understand your question.

Q. We are talking about the trial balance which you said indicated your net position? A. Yes, sir.

Q. And you testified that when you advised a Steamer Block abroad you credited the Banca Commercial Italiana with the amount? A. Yes.

Q. And after that you took off a trial balance? A. Yes, sir.

Q. Now I am asking you whether that trial balance showed the amount of that Steamer Block 158
in Lire as an asset? A. No.

Q. It did not? A. No.

Q. The answer is it did not? A. It did not.

Q. Prior to the date of the receivership, did the Banca Commerciale Italiana, send to the bankrupt statements of unpaid drafts outstanding?

Mr. Goldmark.—What was the question?

Q. (Read)

Mr. Memhard.—I will withdraw the question.

Q. After bankruptcy, did the bankrupt or the 159
receiver receive from the Banca Commerciale Italiana a statement of unpaid drafts? A. Yes, sir.

Q. That list was sent by Banca Commerciale Italiana at the request of the receiver, or the trustee? A. Yes.

Q. Was it the practice of the Banca Commerciale Italiana to send such lists of unpaid drafts outstanding to the bankrupt? A. I can't answer as to whether this particular bank sent such state-

ments or not; they may have sent them on request—I am not in a position to state. I know we got them from some banks, but I am not sure whether we got them from this bank or not.

Q. Let me refer to the drawing service Exhibit No. 1 and to section 12 thereof on page 4, which reads: "Payment of drafts abroad is not usually reported to us; and we can only ascertain whether or not drafts have been presented for payment by making special inquiry of the drawee bank." That referred to this bank, did it not, the Banca Commerciale Italiana? A. I believe it did, yes.

161 Q. And you did not receive periodical statements from that bank showing unpaid drafts outstanding? A. No.

Mr. Memhard.—Now I call upon the trustee to produce a letter dated September 8, 1923, from Banca Commerciale Italiana to the trustee. This letter is also mentioned in the letter from the Banca Commerciale to the trustee or receiver, dated September 10th, which is in evidence.

Mr. Goldmark.—The trustee has, so far as counsel knows, no such letter.

162 Q. Will you refer to Exhibit 19, Mr. Schulze? A. Yes, sir.

Q. And note there reference to a letter of September 8th? A. Yes, sir.

Q. Can you produce that letter? A. Upon request of Mr. Manice, I looked for that letter in the files of Knauth, Nachod & Kuhne and the trustee, and I couldn't find any such letter.

Q. Can you say whether, in the ordinary course of business, that letter would have come to you? A. No, it would not have come to me in the ordinary course of business.

Q. To whom would it have come, in the ordinary course of business? A. It would have gone to the mail clerk and he would have analyzed it to find out to what department it might have referred and then referred it to that department.

Q. So you can't even now say to what individual in the bankrupt's organization that letter went? A. Not unless I know the contents of the letter.

Q. It is clear, is it not, that the letter relates to the request of the receiver and trustee for the transfer of all unpaid drafts?

Mr. Goldmark.—I don't think this man can pass on it any more than the Special Master can. 164

The Master.—You may try further.

Mr. Memhard.—If you refer to the letter, you will see that.

Q. This letter relates to an attempt on the part of the trustee to have brought back here to him the Lire standing to the credit of the bankrupt? A. Yes.

Q. That is clear, is it not? A. Yes, sir.

Mr. Goldmark.—I don't think you can qualify this man as an expert and I don't see the purpose of the testimony. 165

The Witness.—The letter of the 10th Exhibit 19, I am referring to here.

Q. Well look at the letter and see the reference to the letter of September 8th? A. Yes, I see that—

Q. Read it? A. (Witness reading) "We beg to confirm your letter of the 8th inst. and to acknowledge receipt of your cablegram of the 23rd ult. reading: 'Refer to

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your letter of July 12th, please cancel all drafts charged but not paid before receivership and remit balance for our credit to Central Union Trust Co., New York.' "

"Information has now been received from all our branches regarding unpaid drafts and we enclose herewith statement of drafts which have been debited but not paid prior to the appointment of the receivership."

Q. Well, now, isn't it clear to your mind, as
167 one being familiar with the business of the bankrupt, that that letter relates to this correspondence between the Banca Commerciale Italiana and the receiver or trustee?

Mr. Goldmark.—I object to that as incompetent, irrelevant and immaterial.

The Master.—I overrule the objection.

A. I really can't say; I don't know what might have been in the letter of the 8th.

Q. But isn't it perfectly apparent to your mind, as a sensible man, that that has some relation to this correspondence between the receiver and the Banca Commerciale Italiana? A. Yes.

168 Mr. Goldmark.—That is assuming a fact not proven yet.

Q. Where would you look if you wanted to find that correspondence? A. I looked in the general files where all answered letters would be and I went to the various departments who may have had the letter from the Banca Commerciale Italiana—that is to say, the foreign exchange accounting department where this letter was routed to; I went to the claim department; I went to the

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Vostro Department; I went to the cable department and to the stock department.

Q. And that is all you can say about it? A. Yes, sir.

Mr. Memhard.—I want to offer here, for the convenience of everyone, a translation of the terms used in the statements—perhaps we can agree on it without calling a witness.

It is stipulated that the Italian words appear in the correspondence and statements have the following meanings:

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Valuta, in conjunction with a date, means the date upon which the funds shall be or were made available.

Mr. Goldmark.—And the date from which interest is paid or charged.

Mr. Memhard.—Is that correct?

The Witness.—Yes.

Mr. Memhard.—Disposizioni annul appearing in Exhibit 19-B means drawings annulled.

I would like to read the whole item in that connection, on the credit side "September 10th, disposizioni annul, 1,526,048.48, September 10th".

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Dare means debit.

Avere means credit.

Loro means their.

Colla means worth.

Conto means account.

Pagamento means payment.

Causale means items or particulars.

Importo means amount.

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The words a riportare means to be carried forward.

Riporto means brought forward.

Bonifico means a payment effected by means of a credit as distnguished from a payment in cash.

The abbreviation disp. list. means drawing list or list of drawings.

Saldo means balance.

Saldo precedenti means previous balance.

Saldo a nuovo means balance to be brought down.

173 Should it become necessary, for an understanding of the record, to translate any other terms, we may reopen for that purpose.

The Master.—Are you finished with the witness?

Mr. Memhard.—I am through.

The Master.—Does the trustee want to cross-examine the witness?

Mr. Goldmark.—Yes, sir.

Cross-examination by Mr. Goldmark:

174 Q. Mr. Schulze, are you familiar with the methods employed by the foreign exchange department of the bankrupt? A. I am.

Q. Will you please indicate the sequence of transactions from the time of the receipt of an advice from an inland bank, first, down to the time of the transmission of an advice to the foreign bank? A. Advices come generally with checks attached in payment thereof to Knauth, Nachod & Kuhne in an envelope supplied for that purpose, blue or green, I don't remember which,

printed on Knauth, Nachod & Kuhne. The mail department, knowing the contents or purported contents of those envelopes, immediately distributes those to the advising department; the advising department separated the checks from the advices, checked the amount of the check to see whether it corresponded with the amount that had been figured by the bank on the advices—and at that time they kept the checks separate from the advices; in other words, that was one operation. The checks went to what we may call a deposit teller in the foreign exchange department, who listed on the typewriter all of the checks, giving the bank that had remitted and the bank number that the check was drawn on and the amount thereof. These were totalled up in batches and, when convenient, were then turned over to the assistant in the cashier's department, who then, including checks from all other departments, made up a deposit ticket, and it was then deposited in any one of the deposit banks in New York, of Knauth, Nachod & Kuhne; or, where items were drawn on out of town banks, they may have been sent to the collection department so-called, who would send to the out of town banks, for example Chicago or Milwaukee or any other outside places—

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Mr. Trosk.—Do we understand that this is a statement of the general custom or what is supposed to have happened to our particular check?

The Master.—It refers to the general course of business as I understand it.

Mr. Trosk.—Then it has no relation to what happened to our particular check.

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The Master.—I don't know, it may have.

Mr. Trosk.—If it is intended to offer this statement with reference to our check, then I object to it as not being identified with our transaction in any way.

The Master.—To what part of the answer does your objection refer?

Mr. Trosk.—Well, I rose to inquire whether the trustee was attempting to prove merely a general custom or what happened in our particular case. I assume that he was trying to prove a general custom
179 and not what happened in our particular case. If I am correct about that, then it seems to me this testimony is not material to our particular controversy and I would suggest that the witness be not allowed to go any further along those lines.

The Master.—Very well, do not go further on this line.

Q. When the advice, Exhibit 6, was made out, what entry was then made upon the books of the bankrupt? A. The total amount represented on the first sheet of Exhibit 6, which we call a recapitulation, was posted to a memorandum ac-
180 count which we call nostro books.

Q. Have you that book here? A. We have the particular sheets here where this amount was credited.

Q. Will you produce that please? A. (Witness produces paper).

Q. Now produce the sheet from the memorandum book which you state includes the entry of the aggregate of the advised drafts covered by Exhibit 6? A. I do.

Q. And that entry is entry No. 5 from the bot-

tom of the page which you hold in your hand? A. Yes, sir.

Q. And this account purports to be what? A. Purports to be the account of Knauth, Nachod & Kuhne with Banca Commerciale Italiana, Genoa.

Q. And it shows advised drafts, does it not? A. It does.

Q. And it also shows deposits which Knauth, Nachod & Kuhne made with the Banca Commerciale Italiana? A. It does.

Q. And the entries were made upon that sheet, were they not, at the time when the advice to the Banca Commerciale Italiana, in the form of Ex- 182
hibit 6, was ready for mailing? A. Yes, sir.

Mr. Trosk.—I assume that the witness knows these things personally, Mr. Goldmark.

Mr. Goldmark.—I think he does, and if he does not, I want him to say so.

The Witness.—Yes, I do.

Q. It is true, then, is it not, Mr. Schulze, that at any moment you are able to ascertain from the account whether the advised drafts at that moment exceeded, in their aggregate the aggregate of credits which the bankrupts had with Banca Commerciale Italiana? A. As per this 183
book, yes, sir.

Mr. Trosk.—I don't quite understand that answer—may we have the last answer stricken out because I think we were at cross-purposes.

The Master.—Read the last question and answer.

(Question and answer read.)

The Master.—I will let it stand.

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Q. This account, Mr. Schulze, therefore, is substantially the equivalent of an ordinary check book account, is it not?

Mr. Trosk.—I don't think the witness ought to be led.

The Master.—I sustain the objection.

Mr. Goldmark.—I offer in evidence the page to which the witness just referred.

Mr. Trosk.—There is no objection whatever to that page.

(The page referred to was received in evidence and marked Trustee's Exhibit No.
185 1 of October 24, 1924).

Q. At what time, Mr. Schulze, was the entry of 197,508.60 lire made upon Trustee's Exhibit No. 1? A. It was made as of May 22, 1923—as to the hour or exact date, I cannot testify.

Q. Was it made within twenty-four hours? A. Yes, sir.

Q. It was made practically simultaneously with the preparation of the advice and placed in the mail and addressed to Banca Commerciale Italiana? A. Yes.

Q. And is that equally true of the other entries on that page? A. It is.

186 Q. That is the system by which those entries were made? A. Yes, sir.

Q. Referring to the debit side of the same Exhibit, Trustee's Exhibit No. 1, I find an entry, for example, on May 21st, East River National Bank, 250,000; what does that entry indicate? A. That indicates a purchase from the East River National Bank to be paid to the Banca Commerciale Italiana for our account 250,000 Lire.

Q. What date is May 21st, what date does it

represent? A. May 21st represents the date that the transaction was consummated with the East River National Bank.

Q. Will you state, please, whether on May 22nd, 1923, the aggregate of the credits on that account exceeded or were less than the aggregate of the debits?

The Master.—Read the particular question.

Mr. Trosk.—I object to that, if your Honor please, because the witness has already stated that he cannot tell what the fact was; that the best he can do is to state 188 what these books reflect, but that there were debits and credits in transit and that nobody could tell from these entries what the actual condition of the account was abroad on any given date.

Q. (Read).

The Master.—You mean on this book?

Mr. Goldmark.—Yes.

The Master.—Objection overruled.

Mr. Trosk.—I object to it if it is a question of what the books show.

The Master.—Of course I agree that the 189 books show it, but there is no harm in letting a witness sum up the books for me.

Mr. Trosk.—But it is not a statement of fact, but what the books show?

The Master.—That is all.

Mr. Goldmark.—That is all I am trying to show at this time.

The Witness.—The books show total credits, in Lire, of 47,372,171, and the total debits equal 45,811,298.97 Lire.

190 Q. In order that there may be no misunderstanding when we are speaking now of debits and credits, we are speaking from an accounting standpoint. But putting it in the layman's point of view, it means, does it not, that on that day—

Mr. Trosk.—I object to what it means; he ought to let the witness testify.

Mr. Goldmark.—I am trying to show that the debit means that they owe to us; it is a summary of our drawings; in other words that the amount of drawings exceeded the
191 credit which we had in this book on that date. I don't want any mistake, either here or in any other court, as to what debit and credit mean on that statement.

The Master.—What does it mean on that statement?

The Witness.—Debit and credit on this statement means as follows: The debits represent our purchases of Lire which we supplied to the bank for our drawings; the credits represent our drawings against those purchases.

Q. Now did I understand you to testify that
192 on May 22nd, for example, you don't know exactly what particular debits and credits, which appear in Trustee's Exhibit No. 1, had actually been credited to your account on the books of the Banca Commerciale Italiana? A. No, I do not.

Q. You do not know? A. No, sir.

Q. And despite the fact that you didn't know that on May 22nd, you made no entry on that day, did you, of any liabilities to the claimant in this case?

Mr. Trosk.—I don't understand what you mean by that.

Mr. Goldmark.—I mean on their theory that there was an equitable assignment, if their theory is correct, then until the money was available at the Banca Commerciale Italiana, if our obligation was to assign a balance over there, then we certainly were liable to the Trinidad Bank until that assignment had taken place and the funds were available in Italy.

The Master.—I think that is very speculative. 194

Q. Referring to the trial balance, Mr. Schulze, if on the day that your trial balance was made up you had immediately, prior thereto, sent a check to a creditor in payment of an obligation of Knauth, Nachod & Kuhne, and the trial balance was made up at such a time that the check could not as yet have been collected—for instance, if you sent it to an out of town creditor, would that indebtedness to that creditor be reflected on the balance sheet?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial. 195

The Master.—I overrule the objection.

Mr. Trosk.—Exception.

Q. Do you understand the question? A. Yes, sir. We showed no such liability on our books for a check that had been drawn just prior to the trial balance.

The Master.—In other words, what you did, you made your entries when the check

was drawn as if the payment had been made?

The Witness.—Yes, sir.

Q. Now when you testify that there are no book entries showing any indebtedness or liability, whichever term we use, to the Trinidad Bank, am I correct in understanding that you mean, by that, that there are no entries other than Trustee's Exhibit No. 1, a copy of the advice from Trinidad, the Steamer Block, the acknowledgement from the Banca Commerciale Italiana—what I mean by
197 that is this: Those are underlying records, are they not? A. Yes, sir.

Q. In other words, when you look at this entry to which I have referred, five lines from the bottom of Trustee's Exhibit No. 1, in order to have that entry at all intelligent, you must go back to supporting records? A. Yes, sir.

Q. And those supporting records disclose what the transaction is? A. That is true.

Q. Now what are those records? A. That will be the Steamer Block socalled.

Q. That is, that will show the detail of every advice? A. Yes, sir.

198 Mr. Trosk.—I don't think we ought to characterize what it will show. It is in evidence and your Honor will see that it does not show the details of every advice at all.

The Master.—I will strike out the last answer.

Mr. Memhard.—Why don't you ask him if it does not refer to Exhibit No. 6?

The Master.—He said it referred to the Steamer Block—that is enough.

199

The Witness.—But it isn't the same as the evidence you have here.

Q. What do you mean by the Steamer Block? A. That is only part of it. In other words, that is not our entire Steamer Block record, that is part of it.

Mr. Memhard. The Steamer Block is the book containing the drafts and dates together?

The Witness.—Yes, sir, but it contains more information than is contained in that Exhibit.

200

Q. It shows the dollar rate, does it not? A. It shows dollars—it might show the rates in some cases.

Mr. Memhard.—Well, Exhibit 6 is an exact copy of the Steamer Block, is it not?

The Witness.—It is a copy of a part of it.

Mr. Memhard.—With the exception of the dollar record.

The Witness.—That is right.

Q. And the dollar record which is a copy of Exhibit 6, plus one further, column, that column shows the number of dollars that you got from the Trinidad Bank? A. Yes, sir.

201

Mr. Memhard.—But Exhibit 6 is a complete copy of the Steamer Block of that date, with the exception of the dollar record, is it not?

The Witness.—That is right.

Q. In other words, Exhibit 6 is what was sent abroad? A. Yes, sir.

202 *Otto H. Schulze for Claimant—Cross.*

Q. And that paper was prepared in quadruplicate? A. Yes, sir.

Q. And one of the copies is a little longer than the other copies, is that right? A. Yes, sir.

Q. And that is the copy which becomes part of your office records? A. Yes, sir.

Q. Referring to Exhibit 6-D, is the paper which I now show you the column which is upon the particular copy which is retained as your office file? A. I can prove it if I had a whole set—I just want a summary.

Q. Here is the whole set (handing witness
203 paper). Is the paper which I now show you the column which is part of the office copy of Exhibit 6-D? A. It is.

Mr. Goldmark.—I offer it in evidence.

(The paper referred to was received in evidence and marked Trustee's Exhibit No. 2 of October 24, 1924).

.....

Subscribed and sworn to before me
this day of 1924.

204 .....
Special Master.

Hearing adjourned, by consent, to October 28, 1924, at ten thirty A. M.

Otto H. Schulze for Claimant—Cross. 205

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK,

In Bankruptcy.

Before ROBERT P. STEPHENSON, Esq., Special Master.

In the Matter
of
KNAUTH, NACHOD & KUHNE,
Bankrupts. 206

32 BROADWAY, NEW YORK CITY,
October 28th, 1924; 10:30 A. M.

HEARING ON RECLAMATION OF FIRST NATIONAL BANK OF TRINIDAD, COLORADO.

Proceeded pursuant to adjournment.

APPEARANCES:

MESSRS. ROSENBERG & BALL, Attorneys for Trustee,
By GODFREY GOLDMARK, Esq., 207
GEORGE G. ERNST, Esq., and
RALPH F. COLIN, Esq., of Counsel.
MESSRS. O'BRIEN, BOARDMAN, PARKER & FOX, Attorneys for Claimant,
By WILLIAM DEFOREST MANICE, Esq., of Counsel,
ALLEN R. MEMHARD, Esq., of Counsel for Claimant.
GEORGE TROSK, Esq., of Counsel for Claimant.

214 *Otto H. Schulze for Claimant—Cross.*

Q. Which meant, did it not, that that was the date on which the money was to be available to you by the Banca Commerciale Italiana? A. Yes, sir.

Q. Now it sometimes happened, did it not, that after a draft had been advised in the method that has been indicated here, you advised the Banca Commerciale, or in other cases other foreign banks, that you cancelled such advice?

Mr. Trosk.—I object to that as incompetent, irrelevant, immaterial, having no relation to the draft in suit, and there is no
215 evidence that the circumstances under which any such notice was given were in any way similar to the circumstances attending this case.

Mr. Goldmark.—Will your Honor hear me on it?

The Master.—Yes.

(Then followed oral argument).

The Master.—I will allow you to show the custom and practice followed between K. N. & K. and the Banca Commerciale Italiana, but not as to all foreign banks.

Mr. Trosk.—We respectfully except, if
216 your Honor please.

Mr. Goldmark.—I will reframe my question, striking out so much as refers at this time to other foreign banks.

The Master.—You had better put a new question.

Q. What was the practice between the bankrupt and the Banca Commerciale Italiana with respect to the cancellation of advised drafts?

Mr. Trosk.—To that question I make the

same objection, also that it is not within the issues.

The Master.—Objection overruled.

Mr. Trosk.—Exception.

A. K. N. & K. would advise the Banca Commerciale Italiana, Genoa, that they desired to have advice in Steamer Block No. so and so cancelled; please do so and advise us and credit our account.

Q. Was it the practice to advise the Banca Commerciale Italiana that such cancellation was at the request of the drawer bank? 218

Mr. Trosk.—I think the witness ought to state what they said and what they did and that Mr. Goldmark ought not to testify for the witness.

Q. Was there a regular printed form used for the cancellation of advised drafts? A. There was.

Q. Have you such form here? A. I believe we have.

Mr. Trosk.—Our objection was to the whole line of testimony, your Honor; I didn't want to interrupt after every question.

The Master.—I think you had better 219
state your objection each time.

Mr. Trosk.—May I have the same objection and exception to each of the questions on this line?

The Master.—I don't think there is any question pending now.

Mr. Trosk.—I mean with respect to the questions already asked since the one I did object to.

220 *Otto H. Schulze for Claimant—Cross.*

The Master.—The last question asked was this: Did you have a form for advised drafts, and he answered yes.

Mr. Trosk.—And I object to that as irrelevant, immaterial and incompetent.

The Master.—Objection overruled.

Mr. Trosk.—Exception.

Q. I show you a paper and ask you if that is the form that was customarily used by the bankrupts in advising the Banca Commerciale Italiana of the request that an advice be cancelled.

221 Mr. Trosk.—I make the same objection, and on the additional ground of form.

The Master.—Overrule the objection.

Mr. Trosk.—Exception.

A. This is one of the forms that we used.

Mr. Goldmark.—I offer it in evidence.

Mr. Trosk.—The same objection, if your Honor pleases.

The Master.—Objection overruled.

Mr. Trosk.—Exception.

(Received in evidence and marked Trustee's Exhibit No. 3, October 28th, 1924).

222 Q. Was it the practice, in transmitting requests to cancel advices in the form of Exhibit 3, to advise the Banca Commerciale Italiana that the cancellation was at the request of the Trinidad Bank or any inland bank?

Mr. Trosk.—I object to that upon the same grounds and upon the ground that the paper in evidence speaks for itself.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. Let me hear the question.

Q. (Read). A. It was not.

Q. Upon the receipt of requests for cancellation in the form of Trustee's Exhibit No. 3, did the Banca Commerciale Italiana in fact cancel the advices requested to be cancelled?

Mr. Trosk.—Same objection.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. It did.

Q. Can you state what entries were thereupon made by them to effectuate that cancellation? 224

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial and, in the very nature of things, this witness cannot know anything about it.

The Master.—Sustained.

Q. Will you state where such cancellations would thereafter appear in statements received by you from the Banca Commerciale Italiana?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial, no evidence that such statements were received.

Mr. Goldmark.—I withdraw the question. 225

Q. You did in fact receive periodic statements from the Banca Commerciale Italiana? A. We did.

Q. In the form of Claimant's Exhibits Nos. 7, 8 and 9? A. Yes, sir.

Q. Was it the practice of the Banca Commerciale Italiana to credit the general account of the bankrupts with the amounts of such cancelled ad-

226 *Otto H. Schulze for Claimant—Cross.*

vices on such statements periodically received by you?

Mr. Trosk.—Same objection, if your Honor please.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. Yes, sir.

Q. And do you know whether there were any credits in these statements?

Mr. Trosk.—I make the same objection.

227 The Master.—Objection overruled.

Mr. Trosk.—Exception.

A. Yes, sir.

Q. I call your attention to Claimant's Exhibit No. 8 and ask you to indicate, if you can, from that exhibit, a credit to the bankrupts for a cancelled draft?

Mr. Trosk.—I object to that on the same grounds.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. On this sheet you show me, the third item
228 on the credit side of this statement shows a cancellation or disposition, 56,925 cancelled, 1,015 lire, value date June 9th.

Mr. Trosk.—Does that refer to a draft?

The Witness.—I don't know whether it refers to a draft or money order.

Mr. Trosk.—That gives you some idea, your Honor, where we are going to be led if we take this kind of testimony.

Q. Was the same practice pursued with respect

to the cancellation of drafts drawn by inland banks?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial and not within the issues.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. It was.

Q. How was the value date for the credit determined?

Mr. Trosk.—Same objection; I think it is entirely immaterial to the issue here. 230

The Master.—Objection overruled.

Mr. Trosk.—Exception.

A. I really don't think I can state how they arrived at the value date.

Q. As of what date? A. Perhaps I didn't hear your question right.

Mr. Trosk.—Are you referring to the item appearing in Exhibit 8 or to the general custom?

Mr. Goldmark.—I am referring to the general custom, as of what date the credit was value dated. 231

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial.

The Master.—Objection overruled.

Mr. Trosk.—Exception.

The Witness.—They would credit our account on the date that they had been able to effect the cancellation. In other words, if I may explain, some of these drafts may have been drawn on their inland correspondents.

232 *Otto H. Schulze for Claimant—Cross.*

Q. You mean their branch banks? A. Their branch banks and, until they had notice that the branch banks had been able to effect cancellation, they would not have been able to make an entry in their accounts, and so notified us.

Mr. Trosk.—I move to strike out the answer on the ground that it appears from the answer that the witness is speculating and has no personal knowledge about it.

The Master.—Motion denied.

Mr. Trosk.—Exception.

233 Q. What practice do you pursue upon receiving a statement in the form of Exhibit 8, indicating a recredit of a cancelled draft?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial and not binding on the claimant.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. That statement would be checked with our memorandum records in the office to determine whether the same entries had been made on their books as had been made on our books.

234 Mr. Memhard.—And you are referring to Trustee's Exhibit No. 1 when you refer to memorandum records?

The Witness.—Yes, sir.

Q. Was this same form as Trustee's Exhibit No. 3 used both in the case of the cancellation of advices of counter-drafts and of drafts drawn by the Trinidad Bank?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial and not

within the issues. There is no proof in this case that there was any cancellation of any drafts by the Trinidad Bank at all. As a matter of fact there wasn't any cancellation and Mr. Goldmark ought not to put that into his question.

Mr. Goldmark.—You make the statement that there was never any cancellation by the Trinidad Bank?

Mr. Trosk.—I say of the draft in suit. As a matter of fact there isn't any proof here that any draft drawn by the Trinidad was cancelled. 236

The Master.—Objection overruled.

Mr. Trosk.—Exception.

A. Yes, sir.

Q. At the time you sent out a request for cancellation in the form of Trustee's Exhibit No. 3, the draft advised was not in the possession of K. N. & K., was it?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial. Some of them may and some of them may not have been.

The Master.—Objection overruled. 237

Mr. Trosk.—Exception.

A. It was not.

Q. K. N. & K. didn't know who had the draft, did they?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial. If your Honor please, this man is an auditor, and I do not think it can be proved by him whether a draft was in the possession of

232 *Otto H. Schulze for Claimant—Cross.*

Q. You mean their branch banks? A. Their branch banks and, until they had notice that the branch banks had been able to effect cancellation, they would not have been able to make an entry in their accounts, and so notified us.

Mr. Trusk.—I move to strike out the answer on the ground that it appears from the answer that the witness is speculating and has no personal knowledge about it.

The Master.—Motion denied.

Mr. Trusk.—Exception.

233 Q. What practice do you pursue upon receiving a statement in the form of Exhibit 8, indicating a recredit of a cancelled draft?

Mr. Trusk.—I object to that as incompetent, irrelevant and immaterial and not binding on the claimant.

The Master.—Overruled.

Mr. Trusk.—Exception.

A. That statement would be checked with our memorandum records in the office to determine whether the same entries had been made on their books as had been made on our books.

234 Mr. Menhard.—And you are referring to Trustee's Exhibit No. 1 when you refer to memorandum records?

The Witness.—Yes, sir.

Q. Was this same form as Trustee's Exhibit No. 2 used both in the case of the cancellation of advices of counter drafts and of drafts drawn by the Trinidad Bank?

Mr. Trusk.—I object to that as incompetent, irrelevant and immaterial and not

within the issues. There is no proof in this case that there was any cancellation of any drafts by the Trinidad Bank at all. As a matter of fact there wasn't any cancellation and Mr. Goldmark ought not to put that into his question.

Mr. Goldmark.—You make the statement that there was never any cancellation by the Trinidad Bank?

Mr. Trosk.—I say of the draft in suit. As a matter of fact there isn't any proof here that any draft drawn by the Trinidad was cancelled. 236

The Master.—Objection overruled.

Mr. Trosk.—Exception.

A. Yes, sir.

Q. At the time you sent out a request for cancellation in the form of Trustee's Exhibit No. 3, the draft advised was not in the possession of K. N. & K., was it?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial. Some of them may and some of them may not have been.

The Master.—Objection overruled. 237

Mr. Trosk.—Exception.

A. It was not.

Q. K. N. & K. didn't know who had the draft, did they?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial. If your Honor please, this man is an auditor, and I do not think it can be proved by him whether a draft was in the possession of

238 *Otto H. Schulze for Claimant—Cross.*

K. N. & K. or whether K. N. & K. knew anything about it. It was, as everybody knows, a large organization with many departments, many heads of departments, many independent departments, and this individual doesn't know everything that K. N. & K. had knowledge of.

The Master.—Overrule the objection.

Mr. Trosk.—Exception.

Q. (Read). A. No, sir.

Q. Now in addition to Trustee's Exhibit No. 3 there was another form which was used when you advised the Banca Commerciale Italiana of the cancellation of drafts, was it not?

239

Mr. Trosk.—Same objection, your Honor.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. Yes.

Q. I show you a paper and ask you whether that was the form which was also customarily used between K. N. & K. and the Banca Commerciale Italiana with respect to the cancellation of drafts?

240

Mr. Trosk.—Same objection, also as to form.

The Master.—Overrule the objection.

Mr. Trosk.—Exception.

A. It was.

Mr. Goldmark.—I offer it in evidence.

Mr. Trosk.—Same objection.

The Master.—Overruled.

Mr. Trosk.—Exception.

(Received in evidence and marked Trustee's Exhibit No. 4, October 28th, 1924.)

Q. When was it customary to use Trustee's Exhibit No. 4?

Mr. Trosk.—Objected to as incompetent, irrelevant and immaterial, and not binding on the Claimant.

The Master.—Objection overruled.

Mr. Trosk.—Exception.

A. We used this form for a two-fold purpose, both for drafts drawn in foreign currency and drafts drawn payable abroad in United States dollars. 242

Q. When did you use it for drafts drawn in foreign currency?

Mr. Trosk.—Same objection, your Honor.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. This form was also used when we had the drafts in our possession, in the possession of K. N. & K.

Q. And Trustee's Exhibit No. 3 when you did not have the drafts in your possession? 243

Mr. Trosk.—Same objection.

The Master.—Overrule the objection.

Mr. Trosk.—Exception.

Q. Why did you have these two different forms, if you know?

Mr. Trosk.—I object to that as immaterial.

The Master.—Sustained.

Q. Do you know the reason why these two forms were used, Trustee's Exhibits Nos. 3 and 4?

244 *Otto H. Schulze for Claimant—Cross.*

Mr. Trosk.—Objected to.
The Master.—Sustained.

Q. What was the purpose of Trustee's Exhibit No. 4 as distinguished from Trustee's Exhibit No. 3?

Mr. Trosk.—Objected to.
The Master.—Sustained.

Q. Were there any other forms used to effect cancellation of advices with the Banca Commerciale Italiana?

245 Mr. Trosk.—Same objection.
The Master.—Overruled.
Mr. Trosk.—Exception.

A. No other forms.

Q. Referring to your books of account, when you drew checks, or when K. N. & K. drew checks upon its ordinary American checking account, for instance, in your general account in the Guaranty Trust Company, when did you make the entries of debit and credit growing out of the drawing of that check?

Mr. Trosk.—Objected to as incompetent, irrelevant and immaterial.
246 The Master.—Sustained.

Q. When you drew checks upon your American bank accounts generally, what was the process with respect to making entries growing out of the drawing of such checks?

Mr. Trosk.—Objected to as incompetent, irrelevant and immaterial.
The Master.—Overrule the objection.
Mr. Trosk.—Exception.

A. Entries were made immediately when the

checks were drawn, crediting the bank drawn upon.

Q. And charging what?

Mr. Trosk.—Same objection.

The Master.—Overrule the objection.

Mr. Trosk.—Exception.

A. It depends on the nature of the transaction. If it were vouchers payable, we would charge vouchers payable.

Mr. Memhard.—What kind of a check is he testifying about? May that not appear?

The Master.—I think the question covered checks on American banks. 248

Q. In making up your balance sheet, and particularly the balance sheet concerning which you testified on your direct examination, was there included, in that statement as your cash item, your checkbook balance or actual balance which you had in fact in the bank on that day?

Mr. Trosk.—I object to that, if your Honor please, on the ground that the witness has already testified that he could not tell, in New York, what balance he had abroad. 249

Mr. Goldmark.—I am not speaking of abroad.

Mr. Trosk.—I didn't notice the question was limited to this country.

Mr. Goldmark.—Will you please read the question.

(Read).

The Master.—Objection overruled.

Mr. Trosk.—Exception.

250 *Otto H. Schulze for Claimant—Cross.*

Q. Do you understand the question? A. Yes, sir. The item on that balance sheet pertaining to cash on hand and in banks represents the balances in New York banks according to our New York collection banks; that is, Chicago and Philadelphia; it represents the balance as appears from our books and not from the banks' books.

The Master.—What books?

The Witness.—The books of K. N. & K.

The Master.—The checkbook?

The Witness.—Yes sir—we had loose checks. We had a control account in the
251 general ledger; we had no actual checkbooks.

Q. As to the accounts in the European banks, what balances did you take to put into this statement concerning which you testified?

The Master.—Balance sheet, you mean?

Mr. Goldmark.—Balance sheet, yes.

A. The balance sheet only reveals the net foreign exchange position.

Mr. Trask.—I object to that as not responsive.

The Master.—I do not think it is re-
252 sponsive, strike it out.

Q. (Read) A. We kept the net balances reflected in each bank, and, from those net totals, we added the debits together and the credits together and took the net figures and showed it in the balance sheet.

Q. In other words, you took your book entries as the basis for that computation? A. Yes, sir.

Q. What do you understand to be the meaning of the term "counter draft?"

253

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial.

The Master.—That has not been brought out on direct.

Mr. Goldmark.—But they put in evidence statements which show transactions between us and the Banca Commerciale Italiana not only with respect to their drafts but in connection with drafts drawn by K., N. & K., their own exhibits.

Mr. Trosk.—There is no reference to a counterdraft anywhere in the case.

Mr. Goldmark.—Exhibit 6-E shows drafts 254
drawn not only by the inland banks, but drafts which they themselves put in.

The Master.—You can ask him what he means by "drafts drawn by ourselves."

Q. Referring to Claimant's Exhibit 6-E, what is meant by the term "ourselves" appearing upon that exhibit?

Mr. Trosk.—I don't think that is subject to explanation by an expert witness; the paper speaks for itself. Under the column "drawn by" it says by "ourselves." We don't need any enlightenment about what that means, and it has nothing to do with 255
the draft in suit.

The Master.—Objection overruled.

Mr. Trosk.—Exception.

The Witness.—Drafts marked "ourselves" in this exhibit mean drafts that are signed by K. N. & K. drawn on their balances abroad

Q. In other words, where K. N. & K. were the drawers of the drafts? A. Yes, sir.

Q. It is a fact, is it not, that those drafts so drawn were advised in the same form as Claimant's Exhibits Nos. 6, 6-A, 6-B and 6-C?

256 *Otto H. Schulze for Claimant—Cross.*

Mr. Trosk.—I object to that on the ground the exhibits speak for themselves.

The Master.—Sustained.

Q. Was that the general practice, to include in these same advices to the Banca Commerciale Italiana, both drafts drawn by inland banks and drafts drawn by K. N. & K.?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial.

The Master.—Overrule the objection.

Mr. Trosk.—Exception.

257

A. It was.

Q. And was the amount of such drafts debited to the general balances of K. N. & K. upon receipt of advices in the same manner as the advised drafts of inland banks? A. Yes, sir.

Q. So that the total of Exhibit 6, for example, is debited to your account by the Banca Commerciale Italiana?

Mr. Trosk.—That is in evidence at least a half dozen times.

Mr. Goldmark.—Exhibit 6 is the summary of K. N. & K. drafts and the inland

258 bank drafts showing an aggregate of 197,000 lire. My question is whether that total is not charged against their account in their statements to the Banca Commerciale Italiana.

Mr. Trosk.—That is already in evidence, that it was.

Mr. Goldmark.—I was not sure whether it was or not; it certainly can't do any harm. Do you concede the fact?

Mr. Trosk.—There is no necessity for a

concession. We have already been over the testimony and it is in evidence.

Q. Did the Banca Commerciale Italiana have a dollar account with K. N. & K. in New York?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. They did.

Q. Did they draw drafts on that account?

Mr. Trosk.—Same objection. 260

The Master.—Overruled.

Mr. Trosk.—Exception.

A. They did.

Q. What was the general practice with K. N. & K. with respect to the charging of advised drafts from the Banca Commerciale Italiana on their dollar account in New York?

Mr. Trosk.—I object to that upon the same grounds.

The Master.—Overrule the objection.

Mr. Trosk.—Exception.

A. When advices were received of drafts drawn 261
on dollar accounts in New York, the bank's account was charged and a draft payable account was credited.

Q. Upon the receipt of a request for the cancellation of drafts drawn on the dollar account, would such request be honored on this side?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial. Your Honor understands, now, that the inquiry

262 *Otto H. Schulze for Claimant—Cross.*

is directed to what K. N. & K. did with respect to the drafts drawn by Banca Commerciale Italiana in an account maintained by Banca Commerciale Italiana with K. N. & K. in New York.

The Master.—Yes. I overrule the objection.

Mr. Trosk.—Exception.

A. May I hear the question?

Q. (Read). A. Might I ask the question where this request came from?

263 Q. From the Banca Commerciale Italiana. A. Upon receipt of such requests from the Banca Commerciale Italiana, drafts would be cancelled and their account would be recredited.

Q. Would the Banca Commerciale Italiana advise you as to who had the draft?

Mr. Trosk.—I object to that upon the same grounds.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. It would not.

Q. Are you able to state what the total credit balance of K. N. & K. was in their general ac-
264 count at the Banca Commerciale Italiana on the evening of May 21st, 1923?

Mr. Trosk.—I object to that question on the ground the witness has already testified he couldn't do it.

The Master.—Objection overruled.

Mr. Trosk.—Exception.

A. I have ascertained what the balance in the general account of K. N. & K. with the Banca

265

Commerciale Italiana was on the date of May 21st from their statement.

Mr. Trosk.—I object to that and move to strike out the answer on the ground that it is obviously hearsay.

The Master.—Objection overruled.

Mr. Trosk.—Exception.

Q. What was such balance?

Mr. Trosk.—Same objection.

The Master.—Sustained as hearsay.

Mr. Goldmark.—I respectfully except.

266

Q. What statement do you refer to?

Mr. Trosk.—I object to that because it refers to a question which has been disallowed.

The Master.—I overrule the objection.

Mr. Trosk.—Exception.

A. I refer to statements that had come to K. N. & K. regularly every week, and it is the statement that has the transactions of May 21st.

Q. What is that statement called, similar in form to what? A. Similar in form to Exhibit No. 7.

267

Q. You mean you can compute, from statements similar to Exhibit 7, the balance in the general account of K. N. & K. at the Banca Commerciale Italiana on the evening of May 21st?

Mr. Trosk.—I renew the objection.

The Master.—I overrule the objection.

Mr. Trosk.—Exception.

A. Yes, sir.

Q. What does such computation show the balance to have been?

268 *Otto H. Schulze for Claimant—Cross.*

Mr. Trosk.—I object to that as incompetent, irrelelant and immaterial and not binding on the claimant.

Mr. Goldmark.—He put those statements in evidence.

The Master.—Well, has he?

Q. What statements, other than those in evidence, do you have to use to find that balance? A. I have to use the statement of May 21st to the 27th, I believe, it is a week's statement—I think the statement prior to Exhibit 7, I am not
269 sure.

Mr. Memhard.—Look at Exhibit 7 and see the dates?

The Witness.—This starts with May 28th and I believe it is the statement just before this one.

Q. Have you that statement here? A. Yes, sir.

Q. Is this the statement which I hold in my hand?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial.

The Master.—Overruled.

Mr. Trosk.—Exception.

270

A. It is.

Mr. Goldmark.—I offer it in evidence.

Mr. Trosk.—I object to this statement upon the same grounds as previously stated. This witness could not state what any balance abroad was based on papers received from the Banca Commerciale Italiana.

Mr. Goldmark.—I confess that that ob-

271 jection comes rather as a surprise in view of the fact that, without any objection, these very statements in precisely the same form for the succeeding weeks were put in evidence.

The Master.—But you did object to them.

Mr. Goldmark.—Not on the ground they were hearsay.

The Master.—What did you do with that statement after you got it?

The Witness.—I computed the balance.

The Master.—I mean at the time you received it, what was done with it?

272 The Witness.—This statement was checked with the accounts we had on our books with the Banca Commerciale Italiana as to whether the entries corresponded.

The Master.—And did they correspond?

Mr. Trosk.—I object to that.

The Witness.—I can't answer that exactly. Generally small differences in the statements would have to be reconciled.

Q. You mean differences of a few Lire one way or the other?

273 Mr. Trosk.—I don't think the witness ought to speculate as to what they probably were.

Mr. Goldmark.—I ask counsel to state specifically what the objection is to this paper.

The Master.—He said it is hearsay and I think he is right unless you show it was accepted by them—then it becomes an account stated.

274 *Otto H. Schulze for Claimant—Cross.*

Q. Can you ascertain what errors, omissions or inaccuracies were discovered in that statement from your books? A. Yes, sir.

Q. Can you do it at this moment? A. No, I am not prepared to it just now.

Mr. Goldmark.—Then I will suspend with the cross-examination on that point for the moment.

I ask that the paper be marked for identification.

(The paper referred to was thereupon
275 marked Trustee's Exhibit No. 5 for identification of October 28, 1924).

Mr. Goldmark.—That is all.

The Master.—Have you finished your cross examination?

Mr. Goldmark.—Yes, sir.

The Master.—There are one or two things about which I am not quite clear and if either side thinks that any questions I put are objectionable, please do not hesitate to make the objection.

By the Master:

Q. Did K. N. & K. keep a double entry set of
276 books? A. Yes, sir.

Q. When the advice was received from the Trinidad Bank, which is in evidence, and the check accompanying it, what debit and credit entries were made on their books? A. There was a debit to the bank in which this check was deposited, the Guaranty Trust or American Exchange National, I am not sure which Bank, and the Nostro account—that is the account they would keep on our books representing our balance abroad, were credited—Nostro meaning our account with them.

Q. Well does Nostro mean your account with the Banca Commerciale Italiana? A. Yes, sir.

Q. The Guaranty Trust Company was debited with the amount of this check? A. Yes, sir.

Q. Was the Banca Commerciale Italiana credited or the Nostro account credited with the same amount? A. It was credited with the same amount in order to determine the profit and loss on the transactions of purchases and sales. The foreign amount is the amount that governs in connection with our balance abroad; the dollars, representing either purchases or sales, are our means of checking as to whether there is any profit and loss on 278
the sale and purchase of Lire with that particular account.

Q. I wish you would explain further what that Nostro account is?

Mr. Goldmark.—Is that Trustee's Exhibit No. 1?

The Witness.—Yes, sir.

Mr. Colin.—The so-called memorandum account.

Q. This account, Trustee's Exhibit No. 1, is headed "Banca Commerciale Italiana, Genoa, Lire." Does this entry mean a credit to that bank? A. It means a credit in foreign amount to 279
that bank.

Q. A credit to that bank of what, dollars, Lire, or what? A. In other words, we credit them with the amount of Lire that we ask them to pay. It is exactly the same kind of an account that we keep with the American Exchange Bank—in other words, there we credit the American Exchange Bank with the checks we have drawn out of the deposits we have made in the bank.

Q. Then I do not see how your books balance

because you have a debit against the Guaranty Trust Company for dollars? A. Yes, sir.

Q. And your only credit is a credit of Lire to this bank? A. There is also a credit of dollars in there, but the dollars represent our conditions as regards the profit and loss on the transaction.

Q. This dollar account here would be reflected again in your profit and loss account? A. If it was a profit and loss, the balance would be reflected. If we take an inventory and put an adjusting entry in this account, we would find out the position in Lire and when we get to an even
281 position, anything over that—it may be a long position or a short position—we would figure the cost of that position and we would put the resulting difference in there, which would be transferred to profit and loss.

Mr. Memhard.—Depending on the day when you took that inventory and the market value of the Lire on that day, isn't that so?

The Witness.—That is so.

Re-direct examination by Mr. Trosk:

Q. Mr. Schulze, you have given us some testi-
282 mony here as to what the bank on the other side did when you asked them to cancel, and the kind of notice you sent it when you wanted it to cancel; do you recall that? A. Yes, sir.

Q. Now isn't it a fact that in every case, within the categories you refer to, the notification by K. N. & K. to Banca Commerciale Italiana to cancel was preceded by a notification from the drawer bank to the bankrupts that the draft had been lost or would not be presented to the drawee bank for payment?

283

Mr. Goldmark.—I object to that as irrelevant and immaterial.

The Master.—Overruled.

Mr. Goldmark.—Exception.

Q. Yes or no?

The Master.—Have you the question in mind? Perhaps you would like to hear it again?

A. To the best of my knowledge that is true with reference to inland banks, but I also testified that these forms were also used in cancelling our own advices.

284

Q. I am not now concerned with drafts drawn by K. N. & K., I am concerned only with notifications which you sent relating to drafts which were drawn by the drawer banks under the drawing service. Confining your answer to those banks, your answer is to the best of your knowledge, yes? A. Yes.

Q. And is it not a fact that in the case of the draft that we now have in litigation in this case, no such notification was ever received by K. N. & K. from the drawer bank? A. That is true.

285

Mr. Trosk.—Now on that I ask to strike out all this witness's testimony about what was done in connection with the cancellation of drafts.

Mr. Goldmark.—Will your Honor hear me that?

The Master.—Yes.

(Then followed oral argument).

The Master.—Motion denied.

Mr. Trosk.—Exception.

286 *Otto H. Schulze for Claimant—Re-direct.*

By Mr. Trosk:

Q. I think you stated, Mr. Schulze, on your direct-examination, that on the 19th of May, 1923, the credits in your account with Banca Commerciale Italiana exceeded the debits, you explaining that debit and credit were used in the reverse of their usual significance. Do you recall that? A. Yes, sir.

Q. In making that answer, Mr. Schulze, you were attempting, were you not, merely to tell the Master what the entries on Trustee's Exhibit
287 No. 1 indicated? A. Yes, sir.

Q. You were not attempting to tell the Master that as a matter of fact over in Italy there was less money in that account than there were drafts in the hands of the Italian bank for payment, or outstanding for payment? A. No.

Q. Now in addition to that, isn't it a fact that Trustee's Exhibit No. 1 includes, in the column in which you make your charges, drawings by K. N. & K.? A. On the debit side?

Q. Whatever side you call it—the side on which you charge the foreign account? A. Well, are you pointing to the right or left hand side?

Q. On the right hand side, what do you put
288 there? A. We put all the drawings against that bank.

Q. So my question was correct: On the side on which you list drawings, in addition to drafts drawn by drawer banks under the drawing service, you also included, did you not, drawings by K. N. & K.? A. Yes, sir.

Q. You also included cable transfers by K. N. & K.? A. Yes, sir.

Q. And you also included sales of foreign cur-

rency by K. N. & K., did you not? A. Not in that account.

Q. So with the exception of the foreign currency I was correct when I said that you did include drafts drawn by K. N. & K. on Banca Commerciale Italiana and cable transfers on Banca Commerciale Italiana? A. Cable transfers sold, yes, sir.

Q. Now even on the face of Trustee's Exhibit No. 1, would you be prepared to say that on the 19th day of May, 1923, the credits did not exceed the charges for drafts drawn under the drawing service alone? A. The credits did not exceed the 290 charges.

Q. Would it be easier for you if I call the left side the asset side and the right side the liability side? A. Yes, sir.

Mr. Goldmark.—Why not call them deposits?

Mr. Trosk.—I will call the left hand side deposits and the right hand side drawings, for the purpose of my cross examination.

Mr. Memhard.—The right hand side is what was drawn against the account in Italy and the left hand side is what K., N. & K. put into the account. 291

The Master.—Mr. Schulze, this left hand side is marked debit.

The Witness.—Yes, sir.

The Master.—As a matter of fact, is that meant to be a debit?

The Witness.—We would charge them for moneys that we had placed in their custody.

292 *Otto H. Schulze for Claimant—Re-direct.*

By Mr. Trosk:

Q. You wouldn't be prepared to swear here, would you, that on Trustee's Exhibit No. 1 the credits which appear on the debit side of this account did not exceed all of the charges against the account for drawings under the drawing service on May 19, 1923?

Mr. Goldmark.—I object to that as immaterial.

The Master.—Overruled.

A. Not from that statement, no.

293 Q. As a matter of fact they largely exceeded it, didn't they? Don't you know that? A. No.

Q. Will I simplify it if I leave out the word "largely"—they did exceed it, didn't they? A. I would say most of the time they did.

Q. On the 19th of May, 1923, is the question.

Mr. Goldmark.—What has that to do with it?

Mr. Trosk.—That is the date you asked him about.

Mr. Goldmark.—I asked him about the 22nd.

294 Q. Well, on the 19th and 22nd and at all times in between? A. I could only tell from their statements.

Q. I am asking you to tell me whether, from the appearance of your books, it was not the fact on the 19th and 22nd?

Mr. Goldmark.—I submit that that is incompetent in view of the fact that he objected to the evidence of what their books showed.

295

The Master.—Overruled.
Mr. Goldmark.—Exception.

A. I wonder if I understand your question right.

Q. If you don't perhaps it is my fault.

On the 19th of May, 1923, did the assets in the Banca Commerciale Italiana account exceed the drawings under the drawing service; in other words, was there a balance in favor of the assets as shown on Trustee's Exhibit No. 1? A. Taking it from the date of the entries?

Q. And treating only, as charges against those assets, drafts or money orders drawn under the drawing service? A. I would have to analyze all 296
of these.

Q. You have already told us that it was, generally speaking, always in favor of the assets column if you take only the drawings under the drawing service against those assets? A. I am afraid I couldn't testify to that.

Q. Didn't you tell me that a little while ago? A. Only the drawings.

Q. Did you think I included everything else? A. Yes.

Q. And even when you thought I included everything else you thought it would be in excess on the asset side? A. Yes.

297

Q. Well now I want to know whether that was the fact on the 19th of May, limiting your charges against the account to drawings under the drawing service? A. Well, you see it starts—

Q. Just answer my question? A. I can't tell.

Q. So you are not prepared to tell the Master, are you, that even if you limited the drawings to the drawing service alone, the assets in that account did not exceed the drawings? A. No, sir.

Q. How long would it take you to determine

298 *Otto H. Schulze for Claimant—Re-direct.*

that? A. That starts out with the total figures—I would have to go back until there wasn't any balance.

Q. But there is no reason why you shouldn't start in with the figures at the top, brought forward? A. Why, in those figures you have cable sales and other items that you want me to eliminate.

Q. That is, on the credit side of the sheet, what is carried forward includes figures which take in things other than drawings under the drawing service? A. Yes.

299 Q. Now assume as you received the advice of a draft and sent your advice abroad you immediately charged Trustee's Exhibit No. 1 with the amount of the Steamer Block? A. Credited, yes, sir.

Q. And as soon as you sent any money to the Banca Commerciale Italiana, even though it was sent only by mail, you immediately gave them a charge for that money on Trustee's Exhibit No. 1? A. Yes, sir.

Q. Now drafts that you had so entered in Trustee's Exhibit No. 1 on the day you mailed the Steamer Block were sent by mail abroad, were they not as a rule, to the person who was to pre-
300 sent them? A. Yes, sir.

Q. And they couldn't arrive for a long time, could they? A. That is true.

Q. And then that person might negotiate them, might he not? A. Yes, sir.

Q. And so in that course of dealing it might be a considerable period of time before the draft was really presented to the drawee bank for payment? A. Yes, sir.

Q. And notwithstanding that, your entries here

were made as of the date you mailed the advice? A. Yes, sir.

Q. So it is bound to be the fact, is it not, Mr. Schulze, that this Trustee's Exhibit No. 1 cannot possibly be a correct statement of the condition of K. N. & K.'s balance in the Banca Commerciale Italiana? A. That is right.

Q. There is no doubt about that? A. No doubt, no, sir.

Q. And any figures that you may have given to this Court, based on Trustee's Exhibit No. 1, are not a true picture at all of the condition of the account in Italy, are they? A. Not in Italy, 302
no, sir.

Q. Is it not a fact, Mr. Schulze, that if at the time the bank abroad received an advice from you, it did not have a balance to the account of K. N. & K. against which to charge that draft, they would decline to charge it and credit it to drafts payable? A. That is not true.

Q. So that, as far as you were concerned over here, you felt that they would charge your account and credit drafts payable with the amount of a draft when they received that advice, even though they didn't have sufficient funds of K. N. & K. at that time against which to charge it? A. Yes. 303

Q. Was that the universal practice? A. No.

Q. You mean there were exceptions to that rule? A. Yes, sir.

Q. Were there any well defined exceptions? A. In this particular case?

Q. In this particular case, yes. A. Well, they allowed us an overdraft of some 50,000 lire.

Q. So they would extend you that much credit? A. Yes, sir.

Q. And even though your account was not suf-

ficient to meet a Steamer Block, they would charge your account with the amount of it and credit drafts payable provided, according to your testimony, the excess would not be more than 50,000 lire, is that right? A. Yes, sir, excepting this: I know from the correspondence that that privilege was denied K. N. & K. but I don't know at what period it was denied; you would have to refer to the correspondence.

Q. So there was a period when it was denied? A. Yes, sir.

Q. You don't know when that period was? A.
305 No, sir.

Q. Do you know why? A. No.

Q. Did it come at about the time of the bankruptcy? A. No, sir.

Q. Let me read to you a portion of Claimant's Exhibit No. 11 and see if this will refresh your recollection as to what the custom between you was:

"We would ask you further to note that the following orders are being held in abeyance, not having been debited to the account through lack of funds."

And then follow a number of drafts, the total
306 of which is pretty close to a million and a half lire. A. Did you say drafts in your question?

Q. They say here "That the following orders are being held in abeyance," and then on the next page they include drafts. They declined to charge your account and credit drafts payable with respect to those, didn't they? A. Yes, sir.

Q. And the reason they declined to do it was because they didn't have the funds? A. Yes, sir.

Q. You haven't any doubt that that means that

tney didn't have, or deposit for the account of K. N. & K., sufficient lire?

Mr. Goldmark.—I object to that, his statement as to what the reason was.

The Master.—Overruled.

Q. You haven't any doubt that the meaning of those words as used by the Banca Commerciale Italiana to a layman is that the reason was that they didn't have, in the account of K. N. & K., sufficient to its credit, isn't that right? A. Yes, it says "through lack of funds."

Q. And the lack of funds means in the account 308
of K. N. & K., not because they were financially embarrassed? A. No.

Q. K. &. & K. apparently were, isn't that the point? A. No.

Q. As far as the account was concerned? A. No; it happened to be that the cable transfers didn't go through.

Q. Whatever the reason may have been, the fact is that in the mind of Banca Commerciale Italiana K. N. & K. did not have the money to meet the drafts and orders which K. N. & K. had drawn, is that right? A. Yes, sir.

Q. And that was the fact at that time? A. Yes, 309
sir.

Q. Now they did not decline to charge K. N. & K. with the Steamer Block that contained the draft that is in controversy here, did they? A. No.

Q. They actually did charge K. N. & K. with that? A. Yes, sir.

Q. And they credited drafts payable? A. I don't know.

Q. Don't you know that we have stipulated that in this case? A. I don't know what you stipulated.

310 *Otto H. Schulze for Claimant—Re-direct.*

Q. They did charge the account of K. N. & K.? A. Yes, sir.

Q. And that charge remained in exactly the same state up to the time of the bankruptcy, did it not? A. You mean they did not reverse the charge?

Q. Yes. A. Yes, sir.

Q. You never requested them to cancel that draft, did you?

Mr. Goldmark.—You mean prior to the bankruptcy?

311 Mr. Trosk.—Prior to the bankruptcy—I am talking about K. N. & K.

A. You were talking about the charge for this Steamer Block and I am talking about the drafts

Q. I am talking now about the Trinidad draft, which is Exhibit C in evidence in this case; did you ever ask them to cancel that? A. No.

Q. Did they ever cancel it up to the time of the bankruptcy? A. Not having their statements up to the time of bankruptcy during that period, I couldn't tell.

Q. Is that the best answer you can make to that question? A. Yes, sir.

312 Mr. Goldmark.—It is hearsay otherwise.

Q. Don't you know that in the letter of September 10th, in which they sent you a list of the drafts they were then re-crediting, they included this draft? A. Yes, but I didn't know what they did between the time they charged it and September 10th.

Q. As an accountant don't you know that if they told you on September 10th that they were re-crediting your account with a certain draft,

that indicates they didn't do it on August 1st or September 15th? A. It does not indicate it; they may have made a mistake on their books and not even charged us for it at that time.

Q. But they might have? A. Yes.

Q. You don't know but what they may have made a mistake and that is the reason they didn't do it? A. Well, there are so many things involved, I can't tell what they did until I see their statement.

Q. When you saw their statement, didn't you find out then? A. That was after the receivership. 314

Mr. Goldmark.—I object to that on the ground it is hearsay.

Q. I am talking about your knowledge now. You now know that it was not reversed at the time of the bankruptcy, don't you?

Mr. Goldmark.—Same objection.

The Master.—Overruled.

Mr. Goldmark.—Exception.

A. Yes, sir.

Q. And you know it was not reversed until some time in September following the bankruptcy? A. Yes, sir.

Q. And you know that that was done as a result of a direction given by the trustee or the receiver, don't you? A. Yes, sir. 315

Q. And that prior to that time it had not been done? A. That is right.

Q. Now in September they re-credited your account with a certain amount of money that represented drafts that your receiver or trustee had directed them to cancel; do you recall that? A. Yes, sir.

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Q. That money that they then re-credited had been out of K. N. & K's. account for a varying period?

Mr. Goldmark.—I object to that as calling for a conclusion.

Mr. Trosk—We have here, in the stipulation, that immediately upon receipt of advice from abroad, the foreign banks would charge the account of K. N. & K. with the amount of the advice and credit it to drafts payable.

The Master.—Now what is your ques-
317 tion?

Mr. Trosk—My question is whether these various drafts, the amounts of which they re-credited in September, being the equivalent of these various drafts, did not represent a fund which had been in the drafts payable account for a varying length of time. In other words, some of these drafts had been drawn earlier than others, but when they re-credited them, they re-credited them all back on a certain day, the 10th of September.

The Master.—Ask him that.

318 Q. They re-credited to your account in September a lump sum, do you recall that? A. Yes, sir.

Q. Which was the aggregate of all the drafts reversed? A. Yes, sir.

Q. The drafts that had been so reversed had been advised abroad at various times, hadn't they? A. Yes.

Q. Some of them going back a considerable period? A. Yes, sir.

Q. As soon as they received the advice, orig

inally, of the drawing of that draft, they ceased paying K. N. & K. interest on that much money, didn't they? A. Yes, sir.

Q. And they continued to pay no interest on that money until September 10th? A. Yes, sir.

Q. So that throughout the entire period that the money was charged against K. N. & K.'s account and credited to drafts payable, no interest was paid on it? A. Yes, sir.

Q. And that was true with regard to the money which was re-credited in September as a result of the receiver's direction? A. Yes, sir.

320

Q. What was the customary way of sending money to Banca Commerciale Italiana by K. N. & K.? A. Mostly by cable.

Q. That method of treatment of the situation by Banca Commerciale Italiana, that is, paying no interest up to the very time that they re-credited those drafts to the account of K. N. & K., you received a written advice of that, didn't you? A. That we had received no interest?

Q. In the advice you received, it was apparent, was it not, that they had given you no interest on any of this money up to the time they re-credited it back? A. Yes, sir.

Q. And you made no complaint about it? A. 321
Of course not.

Q. You did not take the position that they had not given you interest to which you were entitled? A. No—we were lucky they didn't charge us anything.

Q. That was the way you felt about it? A. Yes.

Mr. Trosk.—That is all.

By Mr. Goldmark:

Q. What compensation did the Banca Commer-

322 *Otto H. Schulze for Claimant—Re-cross.*

ciale Italiana get for its part in these transactions?

Mr. Trosk.—I object to that as immaterial.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. The use of the funds until payment of the drafts was effected.

Q. The use of what funds? A. That they had charged the account of K. N. & K.

Q. You mean the fund in the drafts payable ac-
323 count? A. Yes.

Q. And that is the only compensation they got? A. To my knowledge, yes.

Q. Well you didn't pay them anything else, did you? A. No, excepting there were charges for interest when we had overdrafts in the account.

Mr. Memhard.—In the general account?

The Witness.—Yes, in the general account.

Q. But wasn't it your practice, in all your transactions with Banca Commerciale Italiana, that advised drafts should be put in to the drafts pay-
able account?
324

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial.

The Master.—I think that has already been covered.

By Mr. Trosk:

Q. On this question of compensation, Mr. Schulze, you never had any agreement with the Banca Commerciale Italiana to pay them any sum for this service, did you? A. Well—

Q. Just answer my question yes or no, did you ever have a written agreement? A. Well now—

Q. Did you or did you not? A. They would send us letters of conditions and, if we acquiesced, we probably would not acknowledge it by letter.

Q. Was there ever a letter that you received from Banca Commerciale Italiana in which they said, "The condition under which we will handle this account is that we are to have the benefit and use of the money in the drafts payable account"? A. No.

Q. Was there ever any other writing in which that condition was suggested? A. Except by inference. 326

Q. I am not interested in inferences; was there any other writing? A. Not to my knowledge.

Q. Did you ever have any conversation with anyone representing the Banca Commerciale Italiana in which it was agreed that that should be their compensation? A. No.

Q. And all you have attempted to give here is your inference from the fact that the money was in the drafts payable account and that they didn't pay any interest on it, and your inference is that that is what they got by way of compensation? A. I know we got no interest on it. 327

Q. Wasn't that your inference? A. Yes, from banking custom.

Mr. Trosk.—I move to strike out "Banking custom."

The Master.—Motion denied.

Mr. Trosk.—Exception.

Now I offer to prove that the moneys which came into the hands of the bankrupts, relating to the draft in controversy here,

328 ultimately came into the hands of the Trustee and that they are now in his hands.

The Master.—You mean the money paid by the Claimant to the bankrupt?

Mr. Trosk.—Yes, sir.

Mr. Goldmark.—In dollars?

Mr. Trosk.—In dollars. That the sum of $1,191.21 paid by the Claimant in connection with the draft here in controversy was received by the bankrupts and from the bankrupts was received ultimately by the Trustee and that the Trustee now has that money.

329 Mr. Goldmark.—I object to that offer of proof on the ground that the testimony, if offered, would be incompetent, irrelevant and immaterial.

The Master.—On the ground that, even if it were true, it would not sustain the first cause of action?

Mr. Goldmark.—Yes, sir.

The Master.—I will reserve decision on that.

(Then followed oral argument).

Mr. Goldmark.—Without conceding the materiality, competency or relevancy of the

330 fact, and reserving my objection to its competency and my right to strike out the fact, I concede it to be a fact that after the draft in question was presented and payment refused by the Banca Commerciale Italiana, the draft was returned to the purchaser, Bachisio Tabasco, and that thereupon the First National Bank of Trinidad paid to the said Tabasco the sum of $1,128.87 and thereupon the said Tabasco delivered the

said draft to the First National Bank of Trinidad. 331

Is that what you want?

Mr. Trosk.—We accept that concession with thanks.

Mr. Goldmark.—Now I object to the materiality, competency and relevancy of the fact and move to strike it out on the ground that, on no theory is it of any importance to determine that there was any equitable assignment of the fund abroad or that it increases the right of this Claimant to proceed against any such fund if it did exist. 332

The Master.—I will reserve decision on that.

Mr. Goldmark.—Do you rest now?

Mr. Memhard.—Not until we know the ruling on this question.

The Master.—I will deny the motion.

Mr. Goldmark.—Exception.

Mr. Memhard.—May we consider the matter until two o'clock?

The Master.—Yes. 333

(Whereupon an adjournment was taken to October 28, 1924, at two P. M.)

334 UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK,

In Bankruptcy.

Before ROBERT P. STEPHENSON, ESQ.,
Special Master.

In the Matter

of

KNAUTH, NACHOD & KUHNE,
Bankrupts.

335

32 BROADWAY, New York City.

October 28th, 1924, 2.00 P. M.

HEARING ON RECLAMATION OF FIRST NATIONAL BANK OF TRINIDAD, COLORADO.

Proceeded Pursuant to Adjournment.

APPEARANCES:

MESSRS. ROSENBERG & BALL,
Attorneys for the Trustee,
By GODFREY GOLDMARK, ESQ.,
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Attorneys for Claimant,
By WILLIAM DEFOREST MANICE, ESQ., of Counsel.

ALLEN R. MEMHARD, ESQ., of Counsel for Claimant.

GEORGE TROSK, ESQ., of Counsel for Claimant.

Mr. Goldmark.—Do you rest now?

Mr. Trosk.—With regard to the tracing I made a formal offer of proof as to which your Honor reserved decision. Would it be satisfactory to you if we rested our case with the understanding that if your Honor should determine that we have established a case up to the point where tracing becomes material, we will come before your Honor on any day that you fix?

The Master.—Is that satisfactory?

Mr. Goldmark.—Yes.

The Master.—Then I think that will be all right.

Mr. Trosk.—Upon that understanding, then, the 338
claimant rests.

Mr. Goldmark.—The Trustee moves to dismiss the claimant's reclamation claim upon the ground that the claimant has failed to show any right in any moneys which have come into the hands of the Trustee.

The Master.—Do you make that motion as to each cause of action?

Mr. Goldmark.—I make that motion both as to the first cause of action and as to the second cause of action and I move to dismiss the same separately.

The Master.—I will reserve decision on that.

Mr. Goldmark.—I take it that our Honor does 339
not require me to point out specifically my reasons for the motion.

The Master.—No, I don't think so.

Ralph Dawson, called as a witness on behalf of the Trustee, being duly sworn, testified as follows:

Direct-examination by Mr. Goldmark:

Q. Mr. Dawson, what is your present occupa-

tion? A. I am vice-president of the Guaranty Trust Company.

Q. How long have you been such? A. Five years.

Q. How long have you been connected with the Guaranty Trust Company? A. Twenty years.

Q. Please state generally what your duties have been with the Guaranty Trust Company? A. Over a period of twenty years?

Q. Speaking generally, what departments have you been connected with? A. I have been all over the foreign exchange department in every capacity
341 that it affords, from junior clerk, senior clerk, department head, head of every department in the foreign department, junior officer of the bank, auditor of the bank and vice-president of it.

Q. Are you at the moment connected with any particular department? A. Yes, the foreign department.

Q. Were you connected with any banking business prior to your connection with the Guaranty Trust Company? A. Yes, sir, I was with the National Bank of Commerce.

Q. For how long a period of time? A. Oh, I should say about a year and a half, and prior to that with the Western National Bank which
342 merged into the National Bank of Commerce, for another year and a half, and for three years before that with the foreign exchange firm of C. Schumacker & Company.

Q. Speaking now generally, what were your duties at the National Bank of Commerce and the Western National Bank?

Mr. Trosk.—That is pretty remote, your Honor.

Mr. Goldmark.—Do you concede his competency.

Mr. Trosk.—No.

The Master.—Objection overruled.

Mr. Trosk.—Exception.

A. In the National Bank of Commerce and the Western National Bank?

Q. Yes? A. I was a clerk in the various departments, including the foreign department, teller, bookkeeper—I worked generally over the banks.

Q. Are you from time to time in touch with the officers of other banks? A. Yes, sir, very much in touch with them.

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Q. And in particular with the officers of the foreign departments of other banks? A. Yes, sir.

Q. In the course of your experience in the banking business to which you have just testified, have you become familiar with the business, speaking first broadly, of what is termed international banking? A. Yes, sir, fairly.

Q. The record does not show you smile, Mr. Dawson. Don't be too modest, because the record would show "Fairly" but not your smile.

Mr. Trosk.—I think the witness has answered the question. He said "Yes."

The Master.—I think counsel has a right to inquire what the smile means.

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Q. When you say "Fairly," what do you mean? A. Well, what I mean is I have become as well acquainted with the international banking business as twenty to twenty-five years of intensive experience in every part of the world and with every part of the world and with all sorts of people and all sorts of banking operations can give me.

Q. Have you become familiar with the practices and usages in connection with both the draw-

ing of drafts by New York banks upon their foreign correspondents? A. Yes, sir.

Q. And also the business of so-called protection of drafts by New York banks, bankers or trust companies on behalf of inland banks? A. Yes, sir.

Q. Have you handled such transactions? A. Yes, sir.

Q. From your observation and knowledge of these types of transactions, have you found that there is a general practice or custom in international banking with respect to the method of
347 charging advised drafts?

Mr. Trosk.—Just yes or no.

A. Yes, there is a custom.

Q. What is that custom?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial.

(Then followed oral argument).

The Master.—I will overrule the objection.

Mr. Trosk.—Exception.

Q. (Read). A. You asked me if there was a
348 custom and I said there was.

Q. What is that custom? A. It is the universal custom, in every part of the world which I have visited or had banking relations with, that the drawee bank, upon receipt of advice from its client that a draft has been drawn on it, immediately charges the current account of that client with the amount of any draft or drafts and sets it aside in a special fund awaiting the presentation of any drafts against that fund.

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Q. How is that setting aside usually done? A. It is usually done by a charge—

Mr. Trosk.—My objection runs to all of this, or shall I object to each question?

The Master.—I think you had better.

Mr. Trosk.—I object to this on the same grounds and respectfully except.

The Witness.—The practice is to charge the current account of the client with the sum of money and carry it over into another account which is known on the ledgers of most banks as "unpresented drafts drawn," 350
where it is entered in a folio under the name of the bank whose account has been charged. Do you want me to elucidate and give you an example?

The Master.—No, I think that is clear.

Q. Is there also a general practice or custom with respect to the cancellation of advices, after their receipt by the foreign bank and prior to the presentation of the draft for payment?

Mr. Trosk.—Same objection.

The Master.—Overruled.

Mr. Trosk.—Exception.

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A. May I hear the question again?

Q. (Read). Yes or no, please? A. Yes, there is a custom.

Q. What is that custom?

Mr. Trosk.—Same objection.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. I take it the question means that the drawer

352 bank wants to cancel a draft that has already been drawn and advised.

Q. Precisely? A. A communication of the fact of cancellation by any means he can avail himself of, cable, letter or anything else. Upon receipt by the drawee bank that such draft has been cancelled, a reversal entry is passed, taking the amount of such cancelled draft from the unpresented draft ledger and crediting it back into the current account.

Q. And does that same custom prevail in the case of drafts drawn by inland banks, where the
353 advice is by the New York bank?

Mr. Trosk.—Same objection.
The Master.—Overruled.
Mr. Trosk.—Exception.

A. Yes, because the foreign bank, the drawee bank, does not know the party who is drawing.

Mr. Trosk.—I object to that, if your Honor please; the answer is yes, and I move to strike out the balance.
The Master.—Strike it out.

Q. Is such cancellation ordinarily and custom-
354 arily effected without assiging any reason?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial.
The Master.—Overruled.
Mr. Trosk.—Exception.

A. The drawee bank acts entirely on the orders of its client.

Q. Which is the bank— A. Which is the bank that has the account on its books.

Q. Now, Mr. Dawson, these practices have ob-

tained for a very considerable period of time, have they not? A. A very, very long time.

Q. Is there a generally accepted reason amongst bankers, recognized amongst the people engaged in this business for this practice?

Mr. Trosk.—I object to that as immaterial.

The Master.—Overruled.

Mr. Trosk.—Exception.

Q. Yes or no, please. A. Yes.

Q. Will you please state what those reasons are? 356

Mr. Trosk.—Same objection.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. The original reason for this procedure was the necessity of bankers, in days when they had no Federal Reserve Banks or banks of rediscount, or methods of suddenly raising cash, that when they received intimation from a client that he had drawn on them, immediately, to put themselves in possession of funds to meet their commitments; or a banker would liquidate his investments, enterprises or whatever he was engaged in, to put himself in possession of cash, and the custom 357 arose, since he could not invest his money, but was obliged to hold it, that he didn't pay interest, and he held the money in his box or in his office, useless, awaiting the presentation of the commitment or draft.

Q. How has that practice developed in modern times? A. Well, the practice has hung on in modern times, like a great many other practices, and has been availed of as a means frequently

of compensating a banker for an account that would otherwise be troublesome and a loss. You have many accounts frequently that are active, which, on bare balances in current accounts, are a lot of trouble and a loss in handling that would not be worth while, but there is always a non-interest bearing float that compensates you for the trouble you take.

Q. So that in reality there are two reasons, are there not, generally assigned, namely, to put the drawee bank or banker in a position to meet the
359 drafts which have been advised, and to enable him to use that fund as he may without paying interest thereon to the person who has the account? A. That is right.

Mr. Goldmark.—Your witness.

Cross-examination by Mr. Trosk:

Q. When is the last time you were in Italy, Mr. Dawson? A. I have not been in Italy.

Q. When is the last time you were in France? A. 1922.

Q. When is the last time you were in Greece?
360 A. I haven't been in Greece.

Q. Were you ever in Sweden? A. Yes.

Q. Norway? A. Yes.

Q. Denmark? A. Yes.

Q. Russia? A. Yes.

Q. Never been in Italy? A. Never been in Italy.

Mr. Trosk.—That is all.

Re-direct-examination by Mr. Goldmark:

Q. Have banks or bankers with which you have

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been connected done business with the countries which counsel has just alluded to? A. Yes, sir.

Q. Is the practice to which you referred, a practice which is indulged in by the banks in New York when they are drawee banks?

Mr. Trosk.—I object to that as immaterial to the controversy.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. I should say in nine cases out of ten, at least.

Mr. Goldmark.—That is all.

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Mr. Trosk.—Not universal?

The Witness.—There may be a rare exception, but I am not conversant with it.

The Master.—You said, in explaining the reason for this, that the money was held by the foreign bank in its box, useless. What do you mean by that?

The Witness.—That was in the old days; they used to realize on investments, holding the actual cash, before there were bank notes or bills of exchange or simple instruments of value; they used to collect the actual cash and hold it in the box awaiting presentation, and thereby arose the custom 363 of not paying interest on funds which were awaiting payment out.

The Master—Do they do that now?

The Witness.—No, they don't do that now.

The Master.—What do they do now?

The Witness.—Well, they simply pass a book entry and rely on their general reserve or available cash position.

The Master.—How long have they been

doing the latter, passing a book entry and relying on the general reserve?

The Witness.—Well, I think that point, historically, from where they ceased to realize on investments, is difficult to determine—it may have occurred within the last fifty or sixty years or thirty years.

By Mr. Goldmark:

Q. Your point is, is it not, Mr. Dawson, that in the olden times that you are speaking of, that was the method which drawee banks employed to
365 put themselves in funds to meet these drafts which they knew were coming in for payment? A. Yes, sir.

Q. So that they wouldn't have their own capital tied up in non-liquid investments; is that right? A. Yes, sir—well, they used to realize on their investments.

Q. So as to be in liquid funds to meet the drafts? A. To meet obligations.

By Mr. Trosk:

Q. And the purpose they now serve by doing it by book entry is exactly the same? A. Exactly.

Q. And they tend to accomplish exactly the
366 same result; isn't that right? A. Exactly.

Q. Have you ever seen the books of account of any Italian bank located in Italy? A. No, but I know what they do.

Mr. Trosk.—I move to strike out that he knows what they do.

The Master.—Yes, strike it out.

Q. The answer is no? A. Yes, I have never seen their books of account.

Q. And you have never seen an account book

in Italy, in which there were these transactions that you have recounted for us a little while ago, have you? A. I have seen, from statements from them, how it was performed.

Mr. Trosk.—I move to strike that out.

The Master.—Yes, strike it out.

Q. I ask you if you have ever seen the books of account of an Italian bank located in Italy? A. No.

Q. In which they made the entries that you have attempted to tell us about? A. No.

Q. You made an answer to Mr. Goldmark to 368
the effect that these cancellations were effected upon notification from the drawer, didn't you? A. No, sir, from the client.

Q. Then I may have misunderstood you. A. When the question was asked there was no question of a third party.

Q. You mean the person who drew the draft, when you say client? A. No, sir, I mean the name that is on the books of the drawee bank is the client or the owner of the funds.

By Mr. Goldmark:

Q. You mean the person who has the account in the bank? A. Yes, sir. 369

Q. They cancel the advice at his request whether he is the drawer of the draft or whether he is the person who advised the draft drawn by somebody else? A. Yes, sir; at his order they will cancel the draft.

The Master.—When you said the custom had changed from keeping the money in the box to the present method of making a book entry, does that accomplish the same purpose?

370 The Witness.—Well, we still keep the money in the box, but not specifically. We look over our active liabilities which are imminent, and readjust our cash position in general, but not specifically.

By Mr. Goldmark:

Q. That is, knowing how much the advised drafts are, you know how much money you have to keep as ready cash? A. Yes.

Q. And you determine the amount of drafts which are to come from your general omnibus
371 drafts payable account? A. Yes.

Q. That is, any day, looking at your drafts payable account, you know how many outstanding advised drafts there are, how much that amounts to, and therefore, you know how much available cash you have to have in order to meet that draft? A. Yes.

The Master.—Is there any modification of that?

The Witness.—No, there is no modification, except it is a book position and not a specific position. It is not a particular draft account, but generally the law of averages,
372 based on what we expect to be the likely current demands, which our position would be ready to meet.

The Master.—Under the old system of banks keeping the money in boxes, they didn't have any use of that money, did they?

The Witness.—And they probably earmarked each particular bag for a particular purpose.

The Master.—And under the present system does the bank have the use of that money until the draft is presented for payment?

The Witness.—Yes.

By Mr. Goldmark:

Q. They can lend it on the street? A. Yes.

Q. That is, they could lend a sum equivalent to some one on the street, so that, at any moment, if the number of drafts which had been advised, which came in on a particular day, was more than the average number that came in on another day, 374
you would always know at the beginning of the day how much money you needed from your drafts payable account to meet outstanding drafts? A. Yes.

By Mr. Memhard:

Q. Well that is so because of the present methods and means of having cash instantly? A. Yes, sir.

Q. When you say lend money on the street—A. I mean call money.

Q. That is regarded in banking circles as equivalent to cash in hand? A. Yes—it is one- 375
day cash.

By Mr. Trosk:

Q. You wouldn't lend money that didn't belong to you if you were banker, would you? A. Well, none of our money belongs to us; we are holding deposits.

Mr. Goldmark.—Well, that is a question

376 of law. He is testifying to what they did, no matter whose money it is.

The Master.—You mean that the money the depositors put in is the depositors' money, and not the bank's money?

The Witness.—Well, there is a relationship, of course, between a banker and a depositor; there is a legal relationship of debtor and creditor—I didn't know whether he was talking law or ethics.

Mr. Goldmark.—That is all.

Mr. Trosk.—That is all.

(Witness excused).

377 Mr. Goldmark.—Now I shall attempt to read in evidence the two paragraphs of the stipulation which counsel for the claimant saw fit not to read.

It is stipulated that the following facts are true:

Whenever, prior to the payment of a draft which has been advised abroad in the form of Exhibits 6 to 6-E, the bankrupts notified the Banca Commerciale Italiana to cancel any specific advice or advices, or to stop payment on any draft or drafts covered therein, Banca Commerciale Italiana forthwith recredited the bankrupts' ac-

378 count with the amount of said draft or drafts and at the same time debited the account termed "Drafts Payable" for the same amount. This was done without knowledge on the part of Banca Commerciale Italiana as to whether such draft or drafts were in the possession of the bankrupts, the drawer banks or third persons.

Mr. Trosk.—Don't you propose to read the rest of the same paragraph?

Mr. Goldmark.—No. You may read it. 379
I consider it immaterial.

Mr. Trosk.—I don't like to interrupt you, Mr. Goldmark, but the next sentence to that same paragraph is this:

Subject to proof to the contrary, it is conceded that in every case referred to in this paragraph, the notification by the bankrupts to Banca Commerciale Italiana, was preceded by a notification from the drawer bank to the bankrupts that the draft had been lost or would not be presented to the drawee bank for payment, but in the case at bar no such notification 380
was given by the drawer bank to bankrupts.

Mr. Goldmark.—The point is simply this: I offer the first part, he offers the second part, and I take it you will probably let it in over my objection.

The Master.—Yes.

Mr. Trosk.—With that in, I object to the materiality and relevancy of the first part of the paragraph, it being conceded that in every case referred to in the part read by Mr. Goldmark, the notification by the bankrupts to Banca Commerciale Italiana
was preceded by notification from the 381
drawer bank to the bankrupts that the draft had been lost or would not be presented to the drawee bank for payment, but that in the case at bar, no such notification was given by the drawer bank to bankrupts, showing that we have, in the case at bar, an entirely different situation from that which prevailed in the cases in which such notices were given and accepted.

382 The Master.—I will overrule both objections; they may both go in.

Mr. Goldmark.—Then he is offering that as re-direct?

The Master.—I will allow it in as re-direct.

Mr. Trosk.—Otherwise I would have been obliged to wait until Mr. Goldmark got through.

Mr. Goldmark.—All right; I take an exception to permitting in evidence the stipulated fact beginning with the words, "subject to proof to the contrary."

383 Mr. Trosk.—And I have already objected to the admission of the fact that you read, and I take an exception to its admission.

Mr. Goldmark.—The following facts are stipulated to be true—I am reading from paragraph 11:

The said forms of advice, copies of which are annexed and marked Exhibits 6 to 6-E, included as occasion arose, advices of drafts drawn not only by inland correspondents of the bankrupts, like the claimant, but also drafts drawn directly by the bankrupts. Upon the receipt of advice in the form of Exhibits 6 to 6-E of the drawing of such

384 drafts by the bankrupts, and before such drafts were presented and paid, said Banca Commerciale Italiana thereupon debited the bankrupts' general account referred to in paragraph "9" hereof, with the amount of the draft so drawn by the bankrupts and simultaneously credited the account termed "Drafts Payable" referred to in Paragrap "9" hereof. (Paragraph 9 being one of the paragraphs of the stipulated facts which has already been received in evi-

dence, beginning with the words "When the Banca Commerciale Italiana at Genoa received the papers in the form of Exhibits 6 to 6-E hereof," and so forth).

Mr. Trosk.—We object to that, if your Honor pleases. That relates to what the bank on the other side did in connection with drafts drawn by K. N. & K. Ours, of course, is not such a draft, and we are going outside of the inquiry. This deals particularly with drafts drawn by the bankrupts.

The Master.—I overrule the objection. 386

Mr. Trosk.—Exception.

Otto H. Schulze resumed the stand, having been previously sworn, further testified as follows:

Direct examination by Mr. Goldmark:

Q. Mr. Schulze, since the session this morning have you sought to ascertain whether the statement, Trustee's Exhibit No. 5 for identification, was gone over for the purposes of ascertaining whether it is correct—that is, gone over in the office of the bankrupts? A. I have. 387

Q. What do you find?

Mr. Trosk.—I object to that.

The Master.—Overruled.

Mr. Trosk.—The mere fact that they may have accepted it as true between themselves does not bind us, as I understand it.

The Master.—Objection overruled.

Mr. Trosk.—Exception.

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Q. What did you find? A. I found that there were some exceptions, omissions on our books, that were not shown on their books, of which we sent them notice, and they replied to our letter explaining these exceptions.

Mr. Trosk.—I object to that.

The Master.—Yes, sustained.

Q. Have you here the two letters which reconcile those items of which you speak? A. Yes, sir.

Q. Are these the letters that I hold in my hand? A. They are.

389 Mr. Goldmark.—I offer them in evidence.

Mr. Trosk.—On the state of the proof, I object to these statements.

The Master.—I sustain the objection.

Q. Mr. Schulze, the letter which counsel has objected to, bearing date August 24th, has been objected to on the ground that it does not appear to him that it has any relation to Trustee's Exhibit No. 5 for identification specifically, because the letter opens with the statement, "I have examined your statements of the account of K. N. & K. as of June 15, 1923." Can you explain how those two tie together? A. In making this
390 reconciliation of the two accounts, that is, the account we had on our books, and the statement they rendered as to the account on their books, we did not reconcile each weekly statement; they were kept in a folder and, when the clerk had an opportunity, they were reconciled, and the reconciliation covered the period from December 31, 1922, to the last statement that they rendered as of June 15, 1923.

Q. And therefore, in determining the correctness of the specific statements which they say here

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were the "statements of your account as of June 15, 1923," it became necessary, did it not, as a matter of course, to consider and reconcile prior statements, including Trustee's Exhibit No. 5 for identification? A. Yes, sir.

Q. That, I understand you, was done between you and the Banca Commerciale Italiana by the interchange of these two letters which I hold in my hand? A. Yes, sir.

Q. So that, of necessity, it did require an examination of the statement, Trustee's Exhibit No. 5 for identification? A. Yes, sir.

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Q. Will you please state when that was received? A. June 11, 1923.

Mr. Goldmark.—Now I offer the letters in evidence.

Mr. Trosk.—I can't see any possible bearing of these letters on the case.

(Then followed oral argument.)

Mr. Trosk.—We will stipulate, if Mr. Schulze will swear that he has been all over this and checked it persnally, and it shows a particular figure, subject to correction we will take Mr. Schulze's figure.

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Q. You have been over this and checked it personally? A. Yes, I checked the difference and I found what the difference was as reflected in that letter. In other words, I checked from this statement last night, and I checked from this statement and found the difference between the two.

Mr. Goldmark.—Then I offer in evidence Trustee's Exhibit 5 for identification.

Mr. Trosk.—That may be received on the supposition that Mr. Schulze will swear he has checked it and found it to be correct,

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or that any inaccuracies will be explained by those two letters. Is that correct, Mr. Schulze?

The Witness.—Yes, sir.

(Trustee's Exhibit No. 5 was thereupon received in evidence October 28, 1924.)

Mr. Goldmark.—Now I offer in evidence the two letters.

The Master.—Does that statement and the corrections shown by those two letters make a correct statement?

The Witness.—Yes, sir.

395 The Master.—Have you made the calculation which you refer to on this corrected statement?

The Witness.—Yes, sir.

(Letter dated Genoa, September 7, 1923, from Banca Commerciale Italiana to Receiver, received in evidence and marked Trustee's Exhibit No. 6, October 28, 1924.)

(Letter dated August 24, 1923, Receiver to Banca Commerciale Italiana, received in evidence and marked Trustee's Exhibit No. 7, October 28, 1924.)

By Mr. Goldmark:

396 Q. Will you now state, Mr. Schulze, from the statements in evidence, what the free balance of the bankrupts was on the books of the Banca Commerciale Italiana on May 21, 1923? A. The value-dated balance on hand on the evening of May 21st, was 65,195.14 lire.

Q. Are you able to state what drafts had been advised prior to May 22nd and were afloat, so-called, on the morning of May 22nd? A. I made those figures up, yes, sir.

Q. Will you state the aggregate of such drafts in lire drawn on the Banca Commerciale Italiana?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial.

The Master.—Overruled.

Mr. Trosk.—Exception.

A. 1,931,302.67 lire.

Q. Will you state the aggregate of the drafts which were advised by the bankrupts to the Banca Commerciale Italiana on May 22nd?

Mr. Trosk.—I object to that as incompetent, irrelevant and immaterial. 398

The Master.—Overruled.

Mr. Trosk.—Exception.

Q. Mailed on May 22nd. A. 241,608.60 lire.

Q. And that included the draft which is the subject of this reclamation proceeding? A. It did.

Q. Can you state whether any further deposits were credited to K. N. & K. on the books of Banca Commerciale Italiana on May 22nd?

Mr. Trosk.—In Italy?

Mr. Goldmark.—Yes.

Mr. Trosk.—I don't think this witness has any knowledge of that.

Mr. Goldmark.—We are predicating it 399 on the very statements which are already in evidence.

Q. (Read.) As shown by their statements.

Mr. Trosk.—I don't think that adds anything to it. Same objection.

The Master.—Sustained.

Q. Do their statements show whether any further deposits, so-called, were valued as available on May 22nd? A. Yes.

400 Q. What does the statement show? A. The statement shows a credit—that is, that we had deposited 18,639.75 lire, value dated May 22nd—entered on the 23rd and value dated on the 22nd. My balance is made up on the basis of value dates.

Q. Claimant's Exhibit No. 1 included a service for so-called dollar drafts, did it not? A. It did.

Q. Which means what? A. That the inland banks, under this service, could also draw drafts payable abroad in United States dollars: (a) which United States dollars would be paid by the foreign bank at the buyer's rate for dollar drafts
401 on New York; (b) in actual United States currency.

Q. By actual United States dollars you mean what?

The Master.—That is very plain.

Q. Were such drafts advised to the Banca Commerciale Italiana? A. Yes, sir.

Q. Was the account of the bankrupts at the Banca Commerciale Italiana charged with such a draft upon the receipt of an advice? A. It was not.

Q. How, if you know, did the Banca Commer-
402 ciale Italiana receive compensation for a transaction such as I have indicated; that is, a transaction where the draft was payable in actual dollars in Italy? A. For actual dollar draft drawings, they made a charge of a commission.

Mr. Goldmark.—That is all.

Cross-examination by Mr. Trosk:

Q. Will you tell us what the actual balance was in the Banca Commerciale Italiana, Italy, on June

4, 1923, as shown by their books? A. I would have to check the statement, as I found that was inaccurate, regarding the testimony that I have given. There is a difference of twenty centesimes there.

Q. That won't mean anything on the record. You mean this paper that I have in my hand? A. Yes, sir.

Q. Well, if it is incorrect, it is in some very minor detail? A. Of course, if it is incorrect in a minor detail, I don't know how glaring that may be. There may be quite a decided difference in one day or the next day. 404

Q. If I should tell you that according to this paper that I hold in my hand—

Mr. Goldmark.—I object to referring to a paper which is not in evidence.

The Master.—Overruled.

Q. If I should tell you that on this paper which I hold in my hand it is stated that on the 4th of June, 1923, the balance on the books of the Banca Commerciale Italiana in Italy was 1,045,484.81 lire, you would say that substantially speaking, there was upwards of a million lire there, wouldn't you? That would be fairly safe? A. Yes, taking it over the entire period, the statement is correct. 405

Q. Would it be safe to say there was over a million there on the 4th of June?

Mr. Goldmark.—I object to that as speculative.

The Master.—Overruled.

Mr. Goldmark.—Exception.

Q. I am willing to take an approximation.

It is so large that we can afford to deal in approximations. A. I think that is all right.

Q. It is safe to say that there was million in lire? A. Yes—if that is what the statement shows.

Q. By all means look at it? A. Yes, that is so.

Q. And on the second of June there was about 200,000, wasn't there, approximately? A. Yes.

Q. And on the very day of the second, about 1,300,000? A. That is right.

Q. Now it is a fact, is it not, that the Banca Commerciale Italiana received this particular
407 draft here in suit, the advice of it, I mean, on the 2nd of June? A. Yes.

Q. And they entered it in their books apparently on the 4th? A. Yes, sir.

Q. But as of the 2nd? A. That is right.

Q. And from that date on they stopped paying interest on the amount of money represented by that Steamer Block? A. That is right.

Q. Now K. N. & K. knew all the time, did they not, that a certain interval would elapse between the time they put a draft on board ship or sent a Steamer Block and the time it would be presented? A. Yes, sir.

408 Q. And it was their practice, was it not, to estimate, in their own mind, the time at which these obligations would be presented, with a view to providing the necessary funds at the proper time? A. Yes, sir.

Q. And that they did by cable transfers? A. Yes.

Q. Now, is it not a fact that on the 22nd, they transferred a million lire to Italy? A. Yes, sir.

The Master.—22nd of what?

Mr. Trosk.—22nd of May, 1923.

Q. Which was the day on which this draft began to float? A. That is right,—pardon me.

Q. The morning after? A. It ceased to be afloat then.

Q. No, it was the 22nd of May. A. Oh, I beg your pardon.

Q. It went into the mail, didn't it, on the 21st? A. Yes, sir.

Q. And the very next morning they sent a million lire over there; is that right? A. What date is that?

Q. The 22nd? A. Yes, sir—I was reading from this statement of June 2nd. 410

Q. What were you saying? A. The answer before, when I said, "Yes," I was looking at June 2nd.

Q. Do you want to correct the answer you made? A. Yes.

Q. What would be the correction? A. Their statement does not show the receipt of a million lire.

Q. But I ask you whether or not K. N. & K. did not cable a million lire? A. May 22nd? I don't see that.

Q. How much did they cable on May 22nd? A. 250,000. 411

Q. Didn't they get 250,000 from the Equitable Trust Company? A. They cabled that on the 21st.

Q. Didn't they? A. They cabled that on the 21st.

Q. Did they also, on the 21st, cable 250,000 lire that they got from the Banca Naz del Reduce? A. They cabled that on the 21st.

Q. And didn't they also cable some on the 22nd, 250,000 that they got from the East River Na-

tional Bank? A. They cabled that on the 22nd.

Q. And didn't they cable 250,000 that they got from the Banca di Roma? A. That 250,000 was the only cable that went out on the 22nd, as I heretofore testified.

Q. And on the 23rd they cabled 250,000? A. Yes, sir.

Q. And on the 24th another 250,000? A. That is right.

Q. I mean the bankrupts, when I say "they"? A. Yes, sir.

Q. Am I correct in this, that the 250,000 which
413 was sent on the 21st, purchased from the East River National Bank, was sent as of value date May 23rd? A. Yes, sir.

Q. 250,000 sent from the Banca Naz del Reduce of the value dated May 22nd? A. Yes, sir.

Q. 250,000 on the 21st that they got from the Equitable Trust Company, value dated the 23rd? A. Yes, sir.

Q. 250,000 from the Banca di Roma, sent on the 22nd, value dated the 24th? A. Yes, sir.

Q. And 250,000 sent on the 23rd from the Credito Italiana Genoa was value dated the 24th? A. That is right.

414 Q. Isn't it also true that as far back as May 11th, they had been sending large sums to the Banca Commerciale Italiana as of value dates around the 23rd or 25th? A. There were no cable transactions valued as late as the 25th.

Q. So they did send money,—when I say "they" I mean the bankrupts. I am not interested in whether they sent cables or anything else, but they did send large sums as early as the 11th, which were to become due around the 23rd, 24th and 25th of the month, didn't they? A. Yes, sir.

Mr. Trosk.—That is all. 415

Mr. Goldmark.—That is all of Mr. Schulze.

The Trustee rests.

I renew my motion to dismiss the claim on the ground that the claimant has shown no right, in its own right, in any funds which are in the hands of the trustee, and has shown no right, in itself, as an assignee or as being subrogated to the rights of the payee, or of any other person, in any fund in the hands of the Trustee. I would particularly call your attention to the fact that if their claim should be construed to proceed in the right of the payee and that they 416 are subrogated to the rights of the payee, the rights of the payee are of necessity determined by the laws of Italy, and there is no proof here offered by the claimant as to what the law of Italy is, and your Honor is not in a position to indulge in any presumptions as to what the law of Italy may be.

So that, upon both grounds and as to both causes of action, I move to dismiss on the ground that the claimant has not shown that it is entitled to any of the funds which have come into the hands of 417 the Trustee.

Hearing closed.

Decision reserved.

Briefs to be submitted.

418

Claimant's Exhibit 1.

(Note. This Exhibit was a book called "List of Foreign Correspondents," the first twelve pages of which are here reprinted in full).

FOREIGN EXCHANGE

To Our Correspondents:

The constantly increasing demand for Foreign Exchange, on the part of the public, has led progressive banks throughout the country to add the necessary equipment to their general banking ar-
419 rangements to enable them to meet the requirements of their customers, in the matter of drafts and money order payments in foreign currencies. Inasmuch as the maintenance of a Foreign Department, involving the carrying of balances abroad, etc., is undesirable, from the standpoint of a majority of inland banks, we have aimed for many years to supply this want by extending to our correspondents the privilege of using our world-wide facilities for carrying on a foreign exchange business.

Under our arrangements banks and bankers who are provided with our papers issue their own
420 drafts as Principals on the places mentioned in our list of correspondents. Upon receipt of proper advices, and New York funds to cover such drafts at the rates quoted by us for the day on which the drafts are sold, our advices are at once forwarded and funds provided with the respective drawee banks for the payment thereof, by transfers of credit from our balance or otherwise.

Our list of correspondents has been carefully arranged to include a leading bank in nearly every

city and town of importance. For smaller towns or villages, which are not included in our list, we recommend the use of K. N. & K.
Moneys Orders, the advantages of which are fully described herein.

The efficiency of the service which we are able to render depends to a great extent upon the measure of co-operation which we receive from our domestic correspondents, and we urge upon all our friends the advisability of studying the following pages carefully in order to be fully informed as to the terms and conditions under which the above described service is rendered. 422

KNAUTH, NACHOD & KUHNE.

TERMS AND CONDITIONS

GOVERNING THE USE OF K. N. & K. DRAWING SERVICE

(1) Upon receipt of advice of draft, accompanied by adequate funds payable at par in New York, we shall promptly forward our advice of the same and provide the drawee with funds sufficient for the payment of the draft abroad, by a transfer of credit from our balance, or otherwise, PROVIDED THE DRAFT IS DRAWN ON A BANK NAMED IN OUR LATEST LIST OF CORRESPONDENTS. 423

Under this arrangement, our correspondents in this country act as PRINCIPALS, and issue drafts in their own names, our name not appearing thereon. In other words, we are employed merely as the agents of the drawers for the purpose of advising the issue of their drafts and providing the drawee banks with sufficient funds to cover their payment.

424 *Claimant's Exhibit 1.*

(2) DRAFTS MUST BE SIGNED IN THE NAME OF THE ISSUING BANK OR BANKING FIRM, and, when signed by an officer of an incorporated bank, his official title must be stated.

(3) DRAFTS MUST BE ISSUED IN THE CURRENCY OF THE COUNTRY ON WHICH THEY ARE DRAWN, AS INDICATED IN OUR LIST OF CORRESPONDENTS, WITH THE EXCEPTION OF DOLLAR DRAFTS AS DESCRIBED ON PAGE 5, PARAGRAPH 15. For example, drafts on England must be drawn in Sterling Pounds, Shillings and Pence; drafts on France in Francs and Centimes;
425 drafts on Germany in Marks and Pfennigs; etc.

(4) DRAFTS DRAWN ON FRANCE must have the date spelled out in full, as for example

January twentyseventh 1922

If figures, or other contractions, are used in the date, the draft will be subject to a special French tax for bills of exchange.

(5) DRAFT FORMS are supplied by us, and should be used exclusively, as they are well known throughout Europe and therefore serve to identify the drawers to our friends abroad as being our correspondents, which is of importance to the
426 holders of the drafts.

(6) SPOILED OR VOIDED FORMS should be sent to us marked "VOID" in order that a complete record may be kept in our files.

(7) LOST DRAFTS may be replaced by duplicates; or the face amount may be refunded (after cancellation of advice has been effected abroad and re-transfer of credit has been received by us), at the prevailing purchasing rate when such re-transfer of credit is received, less actual expense in-

curred. In such cases we require a bond of indemnity or written guarantee to hold us harmless should the draft be cashed subsequently by an innocent holder.

(8) DUPLICATES should be issued on special forms, which will be supplied by us upon application, and must correspond in every particular with the original; including Number, Date, Payee and Amount. All duplicate drafts must be plainly marked "DUPLICATE, TO BE PAID ONLY IF ORIGINAL UNPAID," and must be advised to us as soon as issued, in order that we may authorize payment abroad. To COVER THE EXPENSE OF THIS SERVICE, A CHARGE OF 25 CENTS IS MADE. 428

(9) UNPAID DRAFTS sent to us for redemption are purchased by us, WHEN PROPERLY ENDORSED AND THE ENDORSEMENT GUARANTEED BY THE DRAWER, at the buying rate prevailing at the time they reach us. In this connection it should be borne in mind that the value of a foreign draft must be considered in terms of the currency which it represents and not the original dollar amount paid for same. Consequently should such draft remain unpaid, and be presented to us at a later date for redemption in dollars, the foreign amount only must be taken into consideration, and THE AMOUNT OF DOLLARS TO BE RETURNED BY US WILL DEPEND ENTIRELY ON THE VALUE OF THE RESPECTIVE FOREIGN CURRENCY AT THE TIME SUCH REDEMPTION IS MADE. 429

This point is of the utmost importance and should be fully explained to all purchasers of foreign drafts.

(10) ADVICES OF DRAFTS MUST BE MAILED TO US ON THE DAY OF ISSUE. The letter containing the

advices should not be registered but should be sent to us by ordinary mail, addressed "KNAUTH, NACHOD & KUHNE, BANK DELIVERY, NEW YORK, N. Y." Mail so addressed is received by us more promptly than if it bears our street address.

(11) IDENTIFICATION of a holder of a draft may be best accomplished by sending to us, with the drawer's advice, three specimens of the payee's signature to be forwarded by us to the drawee bank. This precaution is advisable for the reason that in most European countries possession is legally sufficient proof of title to warrant pay-
431 ment, and, therefore, European banks do not require any other identification of an apparently rightful holder, and are not legally liable in case it afterwards transpires that either the possession or an endorsement was wrongful. For this reason all drafts should be mailed abroad under registered cover, in order to lessen the possibility of loss. THE OWNER WILL HAVE NO RECOURSE, IN THE EVENT OF A DRAFT BEING PAID TO THE WRONG PERSON THROUGH NO FAULT OF THE PAYING BANK.

Drafts drawn on places in Great Britain, Ireland and France may be protected by "crossing" same. This is done by drawing two parallel lines,
432 about half an inch apart, across the face of the draft from top to bottom and writing "& Co." between these lines. This makes it necessary for the payee to present the draft through a bank, which bank then becomes responsible for the endorsement.

A similar measure of protection may be accorded to drafts drawn on places in Germany by writing on the face of the drafts the words "Nur zur Verrechnung."

REGISTERED MAIL SHOULD ALWAYS BE EMPLOYED IN THE SENDING OF DRAFTS ABROAD.

Claimant's Exhibit 1. 433

The foregoing facts should be brought to the attention of all purchasers of drafts.

(12) PAYMENT OF DRAFTS ABROAD is not usually reported to us; and we can only ascertain whether or not drafts have been presented for payment by making special inquiry of the drawee bank.

Requests for information regarding drafts should contain a reference to our REPORT NUMBER, which will be found on our card acknowledging receipt of the original advice.

(13) RATES, at which we are prepared to sell, or provide for the payment of drafts, are fur- 434
nished to our correspondents by means of our rate cards or by telegraphic quotations. The rates quoted on our rate cards are to be used only on the dates printed thereon, and only for a total amount, in any one currency, of not more than the equivalent of the dollar limit appearing at the top of the card. For additional sales, making a total beyond said limit, special rates must be obtained by telegraph. Cost of telegrams will be borne by us, if our quotation be accepted. Since our rates are the net figures at which drawers must remit to us, it follows that their selling rates should include their profits.

When telegraphing for special rates, the ap- 435
proximate amount required must be stated, together with the name of the city on which the drafts are to be drawn.

If a remittance be made at a wrong rate, we may return same, or hold it and advise the remitter of the deficit or excess, or, if the remittance be insufficient, we may advise the draft abroad and require payment to us by the remitter of the deficit at the correct rate. If the remittance be

436 *Claimant's Exhibit 1.*

more than sufficient, we may advise the draft abroad and return the excess to the remitter.

(14) DRAFTS ON PLACES NOT ON OUR LIST should be bought from us, and such orders must be accompanied by New York funds to cover. If desired, we will mail drafts direct to the payees, postage and registry fees to be paid by the purchaser, but, in so doing, we will act as forwarders only, and without responsibility for delays which are beyond our control, or for any loss which may result therefrom.

437 (15) DRAFTS IN U. S. DOLLARS PAYABLE AT DRAWEE'S BUYING RATE FOR BANKER'S CHECKS ON NEW YORK.

(*See page 77 for special list of correspondents on which such drafts may be drawn.*)

All drafts drawn as above must bear the following notation:

"PAYABLE AT DRAWEE'S BUYING RATE FOR BANKERS' CHECKS ON NEW YORK, OR BY KNAUTH, NACHOD & KUHNE, NEW YORK, AT PAR."

Remittance to be made to us by funds on New York, plus commission as follows:—

438 For amounts under $1,000. ½% Commission, minimum 50¢ per item.

For amounts of $1,000. and under $5,000. ¼% Commission.

For amounts of $5,000. and under $10,000. ⅛% Commission.

For amounts of $10,000. and up 1/16% Commission.

We have made arrangements, whereby all dollar drafts are payable at par in New York, for the following reasons:

FIRST, because dollar exchange on New York is likely to bring a better price abroad.

SECOND, because it thus becomes possible for the purchaser of such a draft to redeem it in New York for the full dollar amount if for any reason he should not send the draft abroad.

We believe that these features will be greatly appreciated and would therefore suggest that special care be taken to write or stamp the complete phrase as above on each dollar draft.

TERMS AND CONDITIONS GOVERNING THE USE OF K. N. & K. MONEY ORDER SERVICE. 440

Our money order service is designed to furnish to our correspondents in this country safe and inexpensive facilities for transferring funds to Europe for their customers.

The system of making remittances by money order is, in many instances, preferable to the use of drafts, particularly in the countries of Central Europe, or wherever the payees reside in villages remote from banking facilities.

In accepting payments for execution by means of money orders, our correspondents act as PRINCIPALS, and, in forwarding their instructions for the execution of such orders, we act as their 441 agents and without responsibility for loss or delay due to causes beyond our control.

(16) ADVANTAGES OF K. N. & K. MONEY ORDERS.

K. N. & K. money orders are especially desirable for the following reasons:

(*a*) Many persons in the more remote parts of Europe frequently experience difficulty in cashing drafts, owing to their unfamiliarity with bank-

442 *Claimant's Exhibit 1.*

ing rules and customs. K. N. & K. MONEY ORDERS overcome this difficulty, as the money is transmitted for delivery direct to the recipient through the nearest Post Office, or other medium best adapted to existing conditions.

(*b*) In many European countries the laws with regard to the identification of the holders of drafts differ from the laws in the United States. In this country the holder of a check must be identified to the full satisfaction of the paying bank, and such bank is legally liable if payment is made
443 on a forged endorsement. In most foreign countries, however, *the person having the draft in his possession is presumed to be the rightful owner*, and there is no liability on the part of the drawer or the drawee if a draft is paid in good faith to an apparent holder on the presentation thereof.

(*c*) Similarity of name, inaccurate address, theft, or other contingency is often responsible for the delivery of letters containing drafts to wrong persons who may cash them. These risks of loss are materially lessened by the use of K. N. & K. MONEY ORDERS, as under this system our correspondents do not issue a negotiable instru-
444 ment, such as a draft or check, but merely forward instructions abroad, through us, to have the payment made through the mediation of the Post Office, or through a bank or other agency, located near the place of destination.

There are a few countries in Europe, however, where the postal service is not organized to handle remittances of this kind, notably, *Greece, Turkey and Spain*. For this reason the issuance of money orders to these countries is not desirable, and remittances should be made by drafts.

Claimant's Exhibit 1.

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In *Great Britain and Ireland* banking facilities are very highly developed, even in the smaller towns and villages, and remittances to these countries also should always be made by drafts on places named in our list.

(17) APPLICATIONS FOR K. N. & K. MONEY ORDERS should be written by the purchaser and must include the full name and complete address of the recipient.

Special care should be taken to see that the names of the village, post office, county, province, or state are inserted.

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When such information is available, the name of the street and the house number of the recipient should also be given.

It is advisable to ascertain from the purchaser whether or not any other person bearing the same, or a similar name resides at the place of destination. If so, a more detailed description of the payee should be furnished, giving the name of the recipient's father or, should the payee be a married woman, her maiden name. These details will help materially in locating the proper benecifiary.

If the purchaser of a K. N. & K. MONEY ORDER is not able to make the application out in English, he may do so in his native language and script. 447

In advising us of money orders, it is important to state the correct currency of the countries where the orders are payable, such as Norwegian Kronor, Swedish Kronor, Czecho-Slovac Kronen, Austrian Kronen, Hungarian Kronen, etc. When a doubt exists as to the Country to which a certain place belongs, it is advisable to ask the re-

448 *Claimant's Exhibit 1.*

mitter for an envelope in which he has recently received a letter from the payee. The postage stamp will serve as a guide in determining the country in which payment is to be made.

In order to detect possible errors or omissions, all applications are gone over very carefully by our staff of experienced clerks, who are familiar with the languages of most foreign countries. Notwithstanding this, however, it is of the greatest importance that the necessity for accuracy and explicitness be impressed upon the remitter, with a view to minimizing the possibility of mis-
449 takes.

(18) MONEY ORDER FORMS are supplied by us. These forms are to be used for money orders only and NOT for cable transfers or the issuance of drafts. Special money order advice lists printed in Italian will be furnished by us if required.

In addition to the money order forms we furnish a NOTIFICATION SLIP, printed in many languages, notifying the payee that a remittance has been made and informing him what steps to take in the event of the payment being delayed.

(19) EXECUTION OF MONEY ORDERS depends
450 largely on the accuracy of the information furnished by the remitter.

Orders received from correspondents in this country are promptly advised to our correspondents abroad, for transmission to the payees, in the manner best adapted to conditions existing in the country of destination. Transmission may be effected by bank payment, by post office money order, by cash contained in registered and insured letters, or through some other reputable agency, at the option of our correspondents. The orders

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will be executed in currency which is lawful money in the place of destination, at the time of execution. Proper notice will be given to the remitter should we receive advice from abroad that a payment cannot be made on account of inaccurate address, or for any other reason.

All payments are effected subject to the laws and customs of the country of destination, and we are not responsible for loss arising from causes beyond our control.

As a rule payments are made against receipts which are forwarded by us to the remitting correspondents as soon as they are received in our 452
office. In some instances, however, such receipts are unobtainable, and, when this is the case, a statement of delivery by the foreign post office or other reputable agency will be furnished if possible. Such receipts or statements must be accepted by our correspondents and remitters as proof of payment.

(20) CLAIMS FOR NON-PAYMENT OF ORDERS, cannot be entertained until a reasonable length of time has elapsed to allow for the receipt of returns from our correspondents abroad. In the event of a change in the address of the recipient named in a money order, we should be informed 453
thereof without delay, and an additional sum of 25¢ should be sent to us to cover the expense of readvising the remittance. We assume no responsibility for delays, or other possible causes of loss, which are beyond our control.

Requests for information regarding K. N. & K. Money Orders should contain a reference to our Report Number, which will be found on our card acknowledging receipt of the original advice.

454 *Claimant's Exhibit 1.*

(21) REFUNDS AND CANCELLATIONS. Inasmuch as we establish credits for the payment of money orders, when advising them abroad, it follows that, when such orders are cancelled, *we can make refund only of the foreign amount which is returned to us, or the equivalent in dollars at the purchasing rate of exchange prevailing when the funds are again at our disposal.* In such cases should the value of the exchange have declined, the remitter must bear the loss, while in the event of an advance in the rate, he will make a profit.

We do not assume any responsibility for fluc-
455 tuations in exchange rates.

(22) RATES, at which we are prepared to sell exchange for money order remittances, are furnished by us in the same manner as we furnish rates for drafts.

OUR CARD QUOTATIONS MUST NOT BE USED FOR AMOUNTS IN EXCESS OF THE SPECIFIED LIMIT FOR A GIVEN DAY AND COUNTRY. Special quotations for amounts exceeding such limit should be obtained from us by telegraph.

The rates which we quote are the net figures at which remittances must be made to us; and, in order to make a profit, selling banks should
456 charge their customers a somewhat higher rate.

If a remittance be made at a wrong rate, we may return same or hold it and advise the remitter of the deficit or excess, or if the remittance be insufficient, we may forward the order abroad, and require payment to us by the remitter of the deficit, at the correct rate. If the remittance be more than sufficient, we may forward the order abroad and return the excess to the remitter.

(23) ADVICES MUST BE FORWARDED TO US IN DUPLI-

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CATE ON THE DAY OF ISSUE. If an advice be delayed by the selling correspondent, such correspondent will be liable, in the event of an advance in the rate of exchange, for such difference as may have occurred in the interim.

(24) DEPOSITS WITH FOREIGN BANKS should always be made by money order, and not by draft.

When the amount of a money order is to be deposited with a bank abroad, it is necessary to state, in the advice, whether the amount is to be deposited in a checking account or in a savings account; and in the latter case for how long a term.

458

Banks abroad insist upon having the full name and address of a depositor, also his signature, in triplicate, for the purpose of identification. This information should be included in the advice of the money order and the specimen signatures should be attached thereto.

For a deposit with the Postal Savings Bank at Vienna or Budapest, it is also advisable to state when, and where the depositor was born, and to furnish a pass-word which can be transmitted to the bank in question, as a means of identification. Deposits with the Italian Postal Savings Bank (Casse Postale di Risparmio) can be made only with the head office at Rome, and, in such cases, it is necessary to state the name of the depositor's father and whether or not he be alive. This is indicated by writing the word "di" before the name in case the father be living, or "fu" in case the father be dead.

459

DOLLAR REMITTANCES

(25) Purchasers of money orders may desire sometimes to have their funds transmitted abroad

460 *Claimant's Exhibit 1.*

in U. S. Dollars. It should be understood, however, that, foreign banks will not always pay out actual U. S. currency, but will convert the dollar amount into the currency of the country in which the payment is to be made at the then prevailing rate of exchange.

Under government regulations in some European countries payments for goods exported, must be made in dollars. In the case of dollar remittances to private individuals, however, it should be pointed out to the purchaser that, should the rate of exchange advance before payment can
461 be made, it will naturally be to the recipient's disadvantage.

MONEY ORDERS PAYABLE AT THE DRAWER'S BUYING RATE FOR BANKERS' CHECKS ON NEW YORK, may be issued to the following countries:

Austria	Germany	Norway
Belgium	Greece	Palestine
Bulgaria	Hungary	Roumania
Czecho-Slovakia	Italy	Serbia
Denmark	Jugo-Slavia	Sweden
Esthonia	Latvia	Switzerland
Finland	Lithuania	Syria
France	Luxembourg	Turkey in Europe

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For all money orders issued in U. S. DOLLARS PAYABLE AT THE DRAWER'S BUYING RATE FOR BANKERS' CHECKS ON NEW YORK, we must be covered by funds payable in New York at par, including ½% Commission, minimum 50 cents per item, as well as the usual postage fee indicated on our rate cards for the respective countries.

Claimant's Exhibit 1. 463

CABLE TRANSFERS

Orders for the payment of money may be forwarded also by means of Cable Transfers.

Such transfers are subject to somewhat higher rates than drafts and money orders, owing to the fact that funds transmitted by cable are available immediately upon receipt of our cable order, and there is no loss of time during transit from New York to the place of payment.

To enable our correspondents to arrive at the proper rates and cable fees, a table has been prepared to indicate how many points are to be added 464
to our quoted MONEY ORDER RATES, and also what amount is to be added for cable charges. This table will be found on page 82. The charges indicated in the table are computed on the basis of a six word address. If the address exceeds this number of words, the additional cost can be readily determined as the cable fee per word to each country is also given. The cable companies count each word of more than ten letters as two words and charge accordingly. This must always be taken into consideration and the number of letters in each word should be carefully counted. Note especially that the MONEY ORDER, not the check 465
rate, is to be used as a basis for determining cable rates.

Instructions concerning the payment of money by cable should always be furnished to us over an official or authorized signature, and "open" telegraphic instructions should always be avoided. Orders may be sent us by telegraph in American Bankers' Association code by members of the Association, or a series of test words may be arranged to protect "open" messages.

466 *Claimant's Exhibit 1.*

Orders for cable remittances will be executed only against cash or a certified check on New York, or against a credit balance on our books. In the case of telegraphic orders remittance to cover should be made by wire, unless a credit balance exists against which the amount can be charged.

As a rule, senders' names need not be mentioned in cable transfers, but in the case of a transfer to a commercial house or bank, it is essential to state in the message for whose account the remittance is made, otherwise such commercial house
467 or bank will be unable to properly credit the funds.

In case of immigrants en route, senders names should be stated, as this is often the only means by which proper identification of the payee can be made.

Cable transfers should be issued in round amounts, if possible. In case it is necessary to forward odd amounts, it must be remembered that an extra charge is made by the cable companies for more than five figures in the amount, and the cost of the extra words must be added to the cable charges.

The execution of cable payments is ordinarily reported to us by mail. If a report by cable is de-
468 sired, additional words in the message will be necessary and the cost of such additional words, as well as the cost of the reply, must be included in the remittance to us.

It is very important to give complete names and addresses of beneficiaries, in order to insure the delivery of the funds to the proper parties. Registered cable addresses can be used under special arrangement only; otherwise, being unknown to our correspondents abroad, they will merely delay the payment.

For frequent cable transfers of large amounts to the same payee, we are able to make arrangements which result in lessened costs for cable charges. Full particulars will be furnished on request.

FOREIGN CURRENCY DEPOSITS.

For the convenience of our customers we have made arrangements whereby we are able to accept deposits in the currencies of any of the European countries quoted on our rate cards, with the exception of Poland, provided the amount to be de- 470
posited is not less than the equivalent of $500.

Interest on the foreign amount will be credited quarterly as long as such foreign amount equals or exceeds the equivalent of $500. at current exchange rates.

We shall be happy to furnish details, and rate of interest, upon request.

FOREIGN COLLECTIONS.

All bills of exchange, sight drafts with documents attached, etc., sent to us for collection, must be endorsed to us in writing, as European banks will not recognize rubber stamp endorsements. 471

We cannot collect bonds or coupons of lottery issues, their transmissions through the U. S. Mail being illegal.

Our charges for all collections (except by Power of Attorney) are one quarter per cent. for amounts less than $1,000.00, and one eighth per cent. for items of $1,000.00, or over in addition to which the usual deduction for charges abroad, foreign government stamps, etc., is made.

472 *Claimant's Exhibit 1.*
Claimant's Exhibit 2.

Our extensive connections assure prompt and efficient service, especially for collections in Continental Europe where we have specialized with a view to meeting every requirement of our correspondents.

(Note, Pages 13-82 of Claimant's Exhibit 1 contain lists of foreign banks which might be drawn on pursuant to the "Terms and Conditions" set forth in pages 1-12 of the Exhibit. A complete copy of the original Exhibit will be produced at
473 the argument).

Claimant's Exhibit 2.

(Note.—This Exhibit was a book of forms of drafts and advices. A paper label on its cover reads as follows):

FOREIGN DRAFTS

From No..... to No.....

The Terms and Conditions under which our correspondents may use the within forms are contained in our list of foreign correspondents, and are subject to change
474 by us from time to time.

Upon receipt of advice of draft accompanied by adequate funds payable at par in New York, we shall promptly forward our advice of same, and make provision for its payment abroad, provided it is drawn on a bank named in our latest list of correspondents.

Under this arrangement our correspondents draw drafts for their own account as principals and our name does not appear, our sole function

being to advise the drawees of the issue of drafts drawn by our correspondents and to provide for payment, in which function we act as agents of the drawers.

To secure prompt payment of drafts, our correspondents must mail their advices and remittances to us on the day such drafts are issued.

Further information and instructions are contained in our latest list of foreign correspondents the provisions of which are hereby referred to and made a part hereof. The use of our facilities will be considered as acceptance of our conditions.

Covering remittances to us should be in exchange on New York, unless otherwise arranged, and must be strictly in accordance with our rates, as issued from time to time, and are subject to the provisions under which our rate quotations are made.

If a remittance be made at a wrong rate, we may return same or hold it and advise the remitter of the shortage or excess; or we may advise the draft abroad and require payment to us of the shortage or return the excess to our correspondent, as the case may be.

KNAUTH, NACHOD & KUHNE
New York.

(Note. A typical set of forms as contained in Claimant's Exhibit 2 is set forth on the following page.)

478 *Claimant's Exhibit 2.*

RECEIPT FOR THE SALE OF

Trinidad, Colo.,

Draft No..... Date.....
Sold to .....
.....
Drawn on .....
.....
Order of .....
Foreign Amount .....
Rate..... Am't Rec'd $.....

We would suggest the advisability of registering the letter in which the draft is mailed abroad.

THE FIRST NATIONAL BANK
of
Trinidad, Colo.

479

THE FIRST NATIONAL BANK of Trinidad, Colo.

No..... Trinidad, Colo.,

CHECK FOR

....192...

Duplicate Unpaid

Pay from balance against this CHECK to

.....or order
.....
.....

THE FIRST NATIONAL BANK OF TRINIDAD

To.....
.....
.....
.....

ISSUING BANK'S RECORD

Draft No..... Date.....

Sold to .....
.....
Drawn on .....
.....

480

Order of .....

Foreign Amount .....

Rate..... Am't Rec'd $.....

In order to lessen the possibility of error drafts should be prepared on the typewriter.

Paid K N & K.....
(Transfer Agents)
Profit $ .....

No.

Advice to be mailed immediately to K. N. & K. Bank Delivery, New York with N. Y. Funds to cover.

Pursuant to the terms and conditions governing your drawing service we have sold draft, bearing the above number, dated,

Trinidad, Colo.....192...

For.....and shall thank you to protect same upon presentation.

We remit herewith the sum of $.....@ Rate.....

Quoted { On Rate Card No. / in Telegram of / Telephone from } .....

Payee .....

For K. N. & K.
Rate Checked
Extension Checked

Amount .....

THE FIRST NATIONAL BANK OF TRINIDAD

Drawn on .....
.....
.....
.....

THE FIRST NATIONAL BANK
OF
TRINIDAD, COLO.

Claimant's Exhibit 3. 481

No. 61161

Trinidad, Colo.
May 19th, 1923
Duplicate unpaid

Check for
Lit. 24,360.00

Pay from balance against this Check to Zara Sanna Giovanni or order Twenty four thousand, three hundred Sixty and 00/100 Lire.

To Banca Commerciale Italiana.
Sassari-Italia.

THE FIRST NATIONAL BANK OF TRINIDAD
S. MONE,
Cashier. 482

Claimant's Exhibit 4.

Advice to be mailed immediately to K. N. & K., bank delievery, New York, with N. Y. funds to cover.

No. 61161

8469 B 69 B

Pursuant to the terms and conditions governing your drawing service we have sold draft, bearing the above number, dated, Trinidad, Colo., May 19, 1923.

For Lit. 24,360.00 and shall thank you to protect same upon presentation.

We remit herewith the sum of $1,191.20 @ rate 483

4.89 quoted { on Rate Card No. / in Telegram of / Telephone from } 18

Payee Zara Sanna Giovanni.

Amount Twenty four thousand, three hundred Sixty Lire.

Drawn on Banca Commerciale Italiane,
Sassari,
Italia.

THE FIRST NATIONAL BANK OF TRINIDAD
S. MONE,
Cashier.

Founded 1852
K N & K
New York
Advice of drafts drawn

When referring to drafts below please mention this number.
S. S. No. 8469-B
Date May 22, 1923.

Banca Commerciale Italiana
Genoa
Italia

Number	Issued by	City	Date	In favor of	Lire
686029	Union Svgs Bank & Tr Co	S Eubenville O	May 21.	Passadore & Co	15.000.00
89800	Ourselves	New York	May 22.	A. Gannu	4.350.00
					19.350.00
93194	"	"	"	Banca Comm. Italiana A-C First Italian St Bank Chicago Ill.	50.000.00
					69.350.00

Please honor the above listed drafts charging same to our account

Very truly yours,
KNAUTH, NACHOD & KUHNE.
By H. B. Duncan-Clarke

Form A-3

Claimant's Exhibit C-A.

164

Claimant's Exhibit 6-B.

Founded 1852
K N & K
New York

When referring to drafts below please mention this number.
S. S. No. 8469-B
Date May 22, 1923.

Banca Popalare Di
Ascoli Piceno Italia

Advice of drafts drawn

Number	Issued by	City	Date	In favor of	Lire
705866	The Sec Svgs Bank & Tr Co	Toledo O	May 19	Agostino Alesi	5,500.00

Please honor the above listed drafts charging same to our account with Banca Comm. Italiana Genoa

Very truly yours,

KNAUTH, NACHOD & KUHNE.
By H. B. Duncan-Clarke

Form A-3

493

494

495

Founded 1852
K N & K
New York

When referring to drafts below please mention this number.
S. S. No. 8469-B
Date May 22, 1923.

Banca Commerciale Italiana
Caltanissetta Italia

Advice of drafts drawn

Number	Issued by	City	Date	In favor of	Lire
685944	First Nat Bank	Hazelton Pa	May 21.	Alsoldata Pane Angelino Compagnia Distrettuale	50.00
655268	Rochester Tr & Safe Dep Co	Rochester N. Y.	May 21.	Dominicelli Antonio	1.000.00
					1.050.00

Please honor the above listed drafts charging same to our account with Banca Comm. Italia Genoa

Very truly yours,

KNAUTH, NACHOD & KUHNE.
By H. B. Duncan-Clarke

Form A-3

Claimant's Exhibit C-C.
166

Founded 1852
K N & K
New York
Advice of drafts drawn

When referring to drafts below please mention this number.
S. S. No. 8469-B
Date May 22, 1923.

Banca Commerciale Italiana
Sassari
Italia

Number	Issued by	City	Date	In favor of	Lire
61160	The First Nat Bank	Trinidad Colo	May 19	Sassu Mebelle Vittoria	14.210.00
61161	"	"	"	Zara Sanna Giovanni	24.360.00
					38.570.00

Please honor the above listed drafts charging same to our account with Banca Comm. Italiana Genoa

Very truly yours,

KNAUTH, NACHOD & KUHNE.
By H. B. Duncan-Clarke

Form A-3

501

500

499

Claimant's Exhibit C-D.

167

Founded 1852
K N & K
New York
Advice of drafts drawn

When referring to drafts below please mention this number.
S. S. No. 8469-B
Date May 22, 1923.

Banca Commerciale Italiana
Roma
Italia

Number	Issued by	City	Date	In favor of	Lire
637518	The Peoples Bank	Buffalo N. Y.	May 21.	Felix Mc Cabe	610.00
89785	Ourselves	New York	May 22.	Ministero Delle Poste E Dei Telegrafi Original only	9.280.20
					9.890.20
89799	"	"	"	A. Gannuscio	15.650.20
93189	"	"	"	Ministero Delle Poste E Dei Telegrafi	57.498.20
					83.038.60

Please honor the above listed drafts charging same to our account with Banca Comm. Italiana Genoa

Very truly yours,

KNAUTH, NACHOD & KUHNE.
By H. B. Duncan-Clarke

Form A-3

Claimant's Exhibit 6-E.

Dare 1923		Causale	
Maggio	28	bonifico Pittsburgh St Bk	.....
	"	spere	.....
	"	"	.....
	29	"	Velig .....
	31	"	.....
	"	disp. 89688	.....
	"	"	.....
Giuguo	1	" list 8464.B.	.....
	"	" " — 5.B.	.....
	"	" " — 6.A.	.....
	"	" " — 5.A.	.....
	"	" " — 4.A.	.....
	"	" " — 6.B.	.....
	"	" " — 8.B.	.....
	"	" " — 8.A.	.....
	"	" " — 8.C.	.....
	"	spere	.....
	"	bonifico D. M. fiuli	.....
	"	"	.....
	"	disp. list 8467 A.	.....
	"	"	.....
	"	"	.....

A riportar

Giuguo 2 Saldo Creditore .....

Avere

Riporto ..

Claimant's Exhibit 7.

505

AUTH NACHOD & KUHNE Loro Conto ordinario colla BANCA COMMERCIALE ITALIANA— Sede di Geno
New York al 2 Fiuguo 1923

Pagamento al nostro domicilio.

	Importo	Valuta	1923		Causale		Importo	Avere Valuta
Riporto	Lt 45,933,472.78					Riporto ..... Lit.	46,128,089.34	
.....	100,000.—	Maggio	28 Maggio	31	verof. Credito of spede N. Y.		250,000.—	Maggio 31
.....	1.—		"	"	" " " Hallgarten		250,000.—	31
.....	1.—		"	"	Merithea of East River		500,000.—	31
.....	43.50		" Fiuguo	1	" Bea Natz del Reduce giu p. v. c.....		250,000.—	22
.....	—.90		"	"	" " " " " " " " "		250,000.—	28
.....	50,000.—		30	"	" Credito of French Am. Bk. S. Tran.		200,000.—	Fiuguo 1
.....	1.—		"					
.....	81,637.40		29			A riportare ..... Lit.	47,828,089.34	
.....	111,221.20		29					
.....	131,791.—		29					506
.....	75,000.40		29					
.....	2,118.—		29					
.....	187,950.10		29					
.....	116,680.40		31					
.....	49,745.—		31					
.....	325,000.40		31					
.....	63.80		"					
.....	100,000.—	Fiuguo	1					
.....	5.55		"					
.....	25,300.—		1					
.....	—.50		"					
.....	—.30		"					
.....	Lit. 47,290,034.23							
.....	538,055.11							
	Lit. 47,828,089.34							507
.....	Lit. 47,828,089.34							
	Lit. 47,828,089.34		Fiuguo	2	Saldo Precedente	Lit.	538,055.11	Diverse

508 **Claimant's Exhibit 8.**

SIGG. KNAUTH NACHOD & KUHNE Loro Conto ordinario colla BANCA COMMERCIALE ITAL
New York al 9 Fiuguo

DARE 1923		Causale	Importo	Valuta 1923		Causale
		Riporto	Lit. 47,290,034.23			
fiuguo	4	spere	1.80	fiuguo	4	verol. Bca Naz di Credito
	"	disp. list 8470 A.	100,000.—	fiuguo	1	" " Bca di Roma of sp
	"	" " 8469 A.	44,100.—		2	" " " " " " " "
	"	" " 8469 B.	197,508.60		2	" " Wers Banca of Ea
	"	"	12.90		3	" " Credito op Nat Bk
	"	pag. Bca Naz Di Credito of Italdisco.....	250,000.—		4	" " " " Equit.
	"	spere	—.30	"		5 " Bca Nat. del Redu
	5	"	—.30	"		6 Credito of Equi Trust
509	6	disp. list 8471 B.	75,400.—		6	" disp. 420,049 anem Uata
	"	"	2.70	"		" verof. Credito of Intern
	"	bonifico Fourth Atlantic—Boston	250,000.—		6	" " " of Chase Na
	"	" Bca Popolare Fugaj.—S. Francisco	250,000.—		6	
	"	" F. Buty & C. Seattle	100,000.—		6	
	"	spere	—.30	"		
	"	disp. list 8472 A.	304,700.20		6	
	"	"	3.70	"		
	"	"	1.—	"		
	"	"	—.30	"		
	"	" 93232	10,000.—		6	
	"	" 93257	250,000.—		6	
	"	" " 8471 A.	79,600.20		6	
	"	" " 8472 A.	20,000.20		6	
	"	"	1.50	"		
	"	"	—.30	"		
510	7	"	2.—	"		
		A riportare	L. 49,221,370.53			

Rec'd Jun 25 1923
Ans'd

...ERCIALE ITALIANA—Sede di Genoa
...al 9 Fiuguo 1923

...ale		Importo	Avere Valuta
	Riporto ..... Lit.	47,828,089.34	
...z di Credito of. Italiano.....		150,000.—	fiuguo 4
...Roma of spede Firuye		150,000.—	4
" " " Roma		250,000.—	4
...anca of East River		250,000.—	4
...op Nat Bk of Comm. N. Y.		250,000.—	4
" Equit. Trust N. Y.....		250,000.—	4
...t. del Reduce of spede N. Y.....		250,000.—	4
...qui Trust		250,000.—	6
...anem Uata		6,600.—	6
...o of Intern. Accept. Bk. N. Y.....		250,000.—	6
...of Chase Nat Bk N. Y.....		500,000.—	6

A riportare ..... Lit. 50,384,689.34

Claimant's Exhibit 8.

		Riporto	Lit. 49,221,370.53				
fiuguo 7	disp. list 8475 A.		60,000.20	fiuguo 7	fiuguo 8	verof. Credito op. French	
"	" " 8474 B.		34,200.20	7	9	" Merit banca of East	
"	spere.....		1.—	"		" disp. 56925 anneltata	
"	Pay Credito op. Guaranty N. Y.		250,000.—	7			
"	.....		—.30	"			
"	disp. list 8470 B.		110,055.—	6			
"	" " 8470 A.		7,781.—	6	fiuguo 9	Saldo Precedente	
"	" " 8474 C.		294,400.40	7			
"	" " 8474 A.		19,586.—	7			
"	"		56.30	"			
"	"		—.30	"			
"	bonifico Pittsburgh St. Bk.—Pittsburgh.....		100,000.—	8			
"	spere		1.—	"			
"	"		8.—	"			
9	"		—.30	"			
"	"		1.—	"			
"	Saldo Creditore		688,242.81				
			Lit. 50,785,704.34				

S. E. & O.
Genova li *9. fiuguo 1921*

Claimant's Exhibit 8.

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.....	Lit. 49,221,370.53				Riporto	Lit. 50,384,689.34		
.....	60,000.20	fiuguo 7	fiuguo 8	verof.	Credito op. French American S. Francisco	150,000.—	fiuguo 8	
.....	34,200.20	7	9	"	Merit banca of East River N. Y.....	250,000.—	9	
.....	1.—	"	"	disp.	56925 anneltata	1,015.—	9	
.....	250,000.—	7						
.....	—.30	"				Lit. 50,785,704.34		
.....	110,055.—	6						
.....	7,781.—	6	fiuguo 9	Saldo	Precedente	Lit. 688,242.81	Diverse	
.....	294,400.40	7						
.....	19,586.—	7						
.....	56.30	"						
.....	—.30	"						
.....	100,000.—	8						
.....	1.—	"						
.....	8.—	"						
.....	—.30	"						
.....	1.—	"						
.....	688,242.81							
	Lit 50,785,704.34							

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S. E. & O.
Genova li *g. fiuguo 1921*

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Claimant's Exhibit 9.

nario colla Banca Commerciale Italiana — Sede di Genova
al 16 fuiguo

Rec'd Jul 5 1923
Ans'd

Importo	Valuta		1923		Causale	Importo	Avere Valuta	
Lit. 50,097,451.53					Pagamento al nostro Domicilio.			
					Riporto Lit.	50,785,704.34		
50.000.—	fiuguo	11	fiuguo	11	versf. Credito of Nat. Shwament Boston	250,000.—	fiuguo	11
.30	"	"		12	if umeng incanata.....	149,998.80		13
42.—	"	"		15	versf. Credito of Richard	140,000.—		15
43,100.—		11		16	" Beg Nat del Reduce of. sperte N. Y.....	500,000.—		16
118,500.80		11						
5.30		"						
84,826.20		11						
3.70		"						
1.20		"						
70,978.90		11						
124,642.20		11						
8.40		"						
71,285.—		11						
34,300.—		11						
11.35		"						
1.—		"						
250,000.—		13						
.30		"						
7,894.—		15						
5.30		"						
.30		"						
77.50		"						
93,894.—		14						
48,552.—		14						
463,468.60		14						
Lit. 51,550,079.88					/riportare Lit.	51,825,703.14		

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Claimant's Exhibit 9.

Sigg. Knauth Nachod & Kuhne Loro Conto Ordinario colla Banca Commerciale Italiana — Sede di Genova
New York al 16 fuiguo

Dare

1923	Causale		Importo	Valuta
		Riporto..... Lit.	50,097,451.53	
fuiguo 11	disp 90219	.....	50.000.—	fiuguo 11
"	spere	.....	.30	" "
"	" Telig	.....	42.—	" "
"	" list 8475 A.	.....	43,100.—	11
"	" " 8475 B.	.....	118,500.80	11
"	"	.....	5.30	"
12	" " 8476-B.	.....	84,826.20	11
515 "	"	.....	3.70	"
"	"	.....	1.—	"
"	" " 8476 C.	.....	70,978.—	11
"	" " 8477 B.	.....	124,642.20	11
"	"	.....	8.40	"
"	" " 8470 A.	.....	71,395.—	11
"	" " 8477 A.	.....	34,300.—	11
"	"	.....	11.35	"
"	"	.....	1.—	"
13	pag. credito I. Richard	.....	250,000.—	13
"	spere	.....	.30	"
15	disp. 8478 A.	.....	7,804.—	15
"	"	.....	5.30	"
"	"	.....	.30	"
"	Telig	.....	77.50	"
516 16	" 8479 B.	.....	93,894.—	14
"	" 8479 A.	.....	48,552.—	14
"	" 8479 C.	.....	463,468.60	14

A riportare Lit. 51,559,079.88

Pagamento al nostro Domic

1923	Causale
fiuguo 11	versf. Credito of Nat. Sh
12	if umeng incana
15	versf. Credito of Richar
16 "	Beg Nat del Redi

Claimant's Exhibit 9.

	Riporto.....	Lit. 51,559,079.88	
fuiguo 16	disp 8481 A.	16,780.—	fiuguo 15
"	spere	19.30	"
"	" 8480 A.	8,837.—	16
"	" 8480 B.	153,525.80	16
"	"	18.60	"
"	" Telig	91.30	"
"	Saldo Creditore	87,351.26	
		Lit. 51,825,703.14	

fiuguo 16 Saldo Precedente ..

S. E. & O.

Genova li 16-6-25

Claimant's Exhibit 9.

517

.....	Lit. 51,559,079.88	
.....	16,780.—	fiuguo 15
.....	19.30	"
.....	8,837.—	16
.....	153,525.80	16
.....	18.60	"
.....	91.30	"
.....	87,351.26	
	Lit. 51,825,703.14	

Riporto Lit. 51,825,703.14

Lit. 51,825,703.14

fiuguo 16 Saldo Precedente ..... Lit. 87,351.25 diverse

S. E. & O.

Genova li 16-6-25

518

519

520

Claimant's Exhibit 10.

Cablegram.

Date June 16, 1923

To Banca Commerciale Italiana
Genoa, Italy

U. S. Court to-day appointed Middleton S. Borland Receiver of our firm, Knauth, Nachod & Kuhne. I have to-day taken possession all assets of K., N. & K., New York. All credit balances in favor of K., N. & K., New York
521 must be held subject to my sole order.

Yours very truly,

Middleton S. Borland
Receiver.

BK-AB
Form 18-B—1000-4.23

175

522

Claimant's Exhibit 11. 523

BANCA COMMERCIALE ITALIANA

Societa Anonima-Sede in Milano

Capitale Sociale L400,000,000

Versato $348.786.000 Riserve L176.000.000

Sede Di Genova

Rec'd Jul 5, 1923
Ans'd

Codici Telegrafici
A B C 4.a & 5.a edizone
Liebers Standard & 5-Letter Code
Western Union
A Z francais 524
Century Standard
Peterson's Int. Banking Code
Bentley's Complete Phrase Code

Segreteria B.

GENOA, June 22nd, 1923.

MIDDLETON S. BORLAND, ESQ.,
Receiver of Messrs. Knauth, Nachod & Kuhne,
NEW YORK.

DEAR SIR

We have to acknowledge receipt of your cablegram of the 16th inst. reading:

> "United States Court today appointed 525
> Middleton S. Borland receiver of our firm Knauth Nachod & Kuhne stop I have today taken possession all assets of Knauth Nachod & Kuhne stop All credit balances in favour of Knauth Nachod & Kuhne of New York must be held subject to my sole order"

Telegrammi: Comitbanca Genova Lettera di Conto Corrente
Tutti i fogli componenti questa lettera devono essere firmati.

526 *Claimant's Exhibit 11.*

of which we have taken due note, and, in order to comply with our general requirements, should esteem it a favour if you would forward us a copy of the receiving order issued by the U. S. Court wherein your appointment was made.

We enclose herewith a statement of the account of Messrs. Knauth, Nachod & Kuhne as at the close of business on the 16th. inst. showing, in principal only, a balance in their favour of:

Lit. 87.351,26.—from which is to be deducted an approximate sum of:

" 8.954,00.—debit balance Dollars Account

527 ($407.15)

" 78.397,26.—

On the 18th. inst. we debited you with:

Lit. 1.—for postage expenses, and now credit you with:

Lit. 158,00—value today, June 22nd, in cancellation of draft No. 8284/34308 drawn by First Nat. Bank, Shreveport, on Banca di Sicilia, Cefalo;

Lit. 12,500.00—value today, in cancellation of drafts Nos. 8450/89135 and 8450/89171 drawn by K. N. & K. on us;

Lit. 60.00—value today, in cancellation of draft

528 No. 8476/733906 drawn by Liberty Sav. Bk. & Trust Co., Memphis, on our Alessandria Branch.

During the last few days several drafts already debited in account have been presented, payment of which we have refused, and would ask you to inform us by CABLE whether we are to pay drafts which have already been passed to the debit of the account or whether we are to consider them as cancelled and re-credit them to the account of Messrs. Knauth, Nachod & Kuhne.

We would ask you further to note that the following orders are being held in abeyance, not

Telegrammi: Comitbanca Genova
Tutti i fogli componenti questa lettera devono essere firmati.

having been debited to the account through lack of funds:

Lit. 300.000.—transfer in favour of Pittsburgh State Bank, Pittsburgh ...as per cable 11/6

" 100.000.—transfer in favour of D. M. Giuli & Son, Milwaukee .....as per cable 11/6

" 100.000.—transfer in favour of Mellon National Bank, Pitsburgh ...as per cable 12/6

" 100.000.—transfer in favour of Pittsubrgh State Bank, Pittsburgh ...as per cable 14/6

Lit. 500.000.—transfer in favour of Banca Popolare Fugazi, S. Francisco ..... as per cable 15/6

it.	17.000.—	drafts—	List No.	8481 B—	as per mail advice				6/6
"	129.560.60	"	— "	"	8482 A—	"	"	"	7/6
"	327.518.00	"	— "	"	8482 B—	"	"	"	7/6
"	89,500.00	"	— "	"	8483 A—	"	"	"	8/6
"	97.418.20	"	— "	"	8483 B—	"	"	"	8/6
"	10.000.20	"	— "	"	8484 A—	"	"	"	9/6
"	871.50	"	— "	"	8484 B—	"	"	"	9/6
"	75.650.40	"	— "	"	8485 A—	"	"	"	11/6
"	41.000.00	"	— "	"	8485 B—	"	"	"	11/6
"	221.039.00	"	— "	"	8485 C—	"	"	"	11/6

In safe custody we hold:

Lit. 24.600.—(nominal value) "Rendita Italiana" (Console) 3½% registered in the name of Raffo Colomba, as per enclosed description, (see our last letter to K. N. & K., dated 23/4/23. P. A. 825), and should be glad to have your authorization to

52

530

531

Telegrammi: Comitbanca Genova
Tutti i fogli componenti questa lettera devono essere firmati.

532 *Claimant's Exhibit 11.*
Claimant's Exhibit 12.

deliver these securities to the interested parties, whose address we would ask you at the same time to indicate.

We await the favour of your early reply, and beg to remain, Dear Sir, Yours very truly,

BANCA COMMERCIALE ITALIANA.

Sede di Genova.

Encl: Statement.
Description of
securities in safe custody.

533

Claimant's Exhibit 12.

Cablegram.

JUNE 26, 1923.

BANCA COMMERCIALE ITALIANA
Genoa, Italy

Please purchase Dollars for equivalent all ballances and cable proceeds Central Union Trust Company, New York, for credit Middleton S. Borland, Receiver for Knauth, Nachod & Kuhne, New
534 York. Cable result.

MIDDLETON S. BORLAND,
Receiver.

Claimant's Exhibit 18. 535

Receiver for
INFORMATION COPY
CABLEGRAM RECEIVED

Date June 30th, 1923.

From
BANCA COMMERCIALE ITALIANA
Genoa, Italy

Dated.....

received here today as follows:

Refer to your cablegram of 26th. cannot make any reimbursement before we know position all our branches. On receipt of our letter of June 22nd reply by cable. 536

Yours very truly,

4 C. I.—10M—11,22.

Claimant's Exhibit 14.

JUNE 29, 1923.

BANCA COMMERCIALE ITALIANA,
Genoa, Italy.

DEAR SIRS:

Enclosed you will find court order appointing me Receiver for Knauth, Nachod & Kuhne, New York, certified to by your Consulate here. 537

I confirm my cable of June 26th reading as follows:

"Please purchase Dollars for equivalent all balances and cable proceeds Central Union Trust Company, New York, for credit Middleton S. Borland, Receiver for Knauth, Nachod & Kuhne, New York. Cable result. Middleton S. Borland, Receiver."

538 *Claimant's Exhibit* 14.

I request you to kindly rule off the account of Knauth, Nachod & Kuhne on the day on which my first cable (confirmation enclosed) informing you of the Receivership reached you, and to forward to me by return mail a statement of their account up to that date, as well as a list of all unexecuted cable transfers and unpaid drafts and money orders, sating the numbers of reports in which the items were advised by Knauth, Nachod & Kuhne.

Yours very truly,

539 MIDDLETON S. BORLAND, Receiver.

M. F.

Encls.

540

Claimant's Exhibit 15. 541

BANCA COMMERCIALE ITALIANA

Societa Anonima—Sede in Milano

Capitale Sociale L400.000.00 Versato L348.786.000 Riserve L176.000.00

Sede di Genova

Telegrafici Codici
- A B C 4.a & 5.a edizone
- Liebers Standard & 5, Letter Code
- Western Union
- A Z francais
- Century Standard
- Peterson's Int. Banking Code
- Bentley's Complete Phrase Code

542

Segreteria B.

GENOA, July 12th, 1923.

MIDDLETON S. BORLAND, ESQ.,
Receiver for Messrs. Knauth, Nachod & Kuhne,
NEW YORK.

DEAR SIR,

We have to thank you for your favour of the 29th. ult. with which you forward us a copy of the court order appointing you Receiver for Knauth, Nachod & Kuhne, New York, duly certified by the Italian Consul in New York.

With regard to your cable of the 26th. ult. reading: 543

> "Please purchase Dollars for equivalent all balances and cable proceeds Central Union Trust Company, New York, for credit Middleton S. Borland, Receiver for Knauth Nachod & Kuhne New York. Cable result"

we have to confirm our wire of the 29th. ult.:

"Refer to your cablegram of 26th. can-

Telegrammi: Comitbanca Genova Lettera Di Conto Corrente
Tutti i fogli componenti questa lettera devono essere firmati

544 *Claimant's Exhibit 15.*

not make any reimbursement before we know position all our Branches stop On receipt of our letter of June 22nd. reply by cable"

so that, while we have got into immediate communication with all our Branches on receipt of your first telegram, we are not yet fully posted as to the position of all.

We would further refer you to our letter of June 22nd. in which we desired you to advise us by CABLE whether we are to pay drafts which have already been passed to the debit of the account
545 or whether we are to consider them as cancelled and to re-credit them to the account of Messrs. K. N. & K.

As we are up to the time of writing without your reply on this point, we have, in view of numerous requests which we are receiving, wired you today as follows:

"Refer to our letter of 22nd. to our cablegram of 29th. June please cable whether we may pay all drafts already charged to the account of Knauth, Nachod & Kuhne, New York"

546 to which we trust to have your prompt response enabling us to regulate this matter.

We take leave to debit the account of K. N. & K with: Lit. 157.55—cable expenses (85.30 and 72.25) and beg to remain, Dear Sir,

Yours very truly,

BANCA COMMERCIALE ITALIANA.
Sede di Genova.

Telegrammi: Comitbanca Genova
Tutti i fogli componenti questa lettera devono essere firmati

547

Claimant's Exhibit 16.

Receiver for

ACTION COPY

CABLEGRAM RECEIVED

Date JULY 13, 1923
General File
Cable Dept.
By B. K.

From
BANCA COMMERCIALE ITALIANA
Genoa, Italy

548

Dated.....

received here today as follows:

Refer to our letter of 22nd (of June) refer to our cablegram of 29th (of June) June please cable whether we may pay all drafts already charged to the account of K., N. & K., New York.

Yours very truly,

549

Claimant's Exhibit 17.

Cablegram.

Date JULY 13, 1923

To

BANCA COMMERCIALE ITALIANA
Genoa, Italy

Answering your cable message I reaffirm our cable message of June 16th. Nothing should be paid or charged Knauth, Nachod & Kuhne, New York, after June 16th irrespective date advised or charged. All drafts charged but not paid must be recredited and balance must be sold and remitted by wire without further delay, as per our wire of June 26th.

Yours very truly,

MIDDLETON S. BORLAND
Receiver.

BK—A B
Form 18B.—10000—4-23

Claimant's Exhibit 18.

Cablegram.

Date AUGUST 23, 1923

To

BANCA COMMERCIALE ITALIANA
Genoa, Italy

Refer to your letter of July 12th please cancel all drafts charged but not paid before Receivership and remit balance for (our) my credit to Central Union Trust Co., New York.

Yours very truly,

MIDDLETON S. BORLAND
Receiver.

MS—TWK
Form 18B.—10000—4-23

Claimant's Exhibit 19.

553

Rec'd Sep 26 1923
Ans'd

BANCA COMMERCIALE ITALIANA

Societa Anonima—Sede in Milano

Capitale Sociale L.400.000.000

Versato L.348.786.000 Riserve L.176.000.000

Sede di Genova

Codici Segreteria A
- Telegrafici
- A B C 4.a & 5.a edizone
- Liebers Standard & 5, Letter Code
- Western Union
- A Z francais
- Century Standard
- Peterson's Int. Banking Code
- Bentley's Complete Phrase Code

554

GENOA, September 10th, 1923.

MIDDLETON S. BORLAND, Esq.,
Receiver for Messrs. Knauth, Nachod & Kuhne,
New York.

DEAR SIR,

We beg to confirm our letter of the 8th. inst. and to acknowledge receipt of your cablegram of the 23rd. ult. reading:

555

> "Refer to your letter of July 12th. please cancel all drafts charged but not paid before receivership and remit balance for our credit to Central Union Trust Co., New York."

Information has now been received from all our Branches regarding unpaid drafts and we enclose herewith statement of drafts which had been debited but not paid prior to the appointment of the receivership.

We are crediting the sum of:

Telegrammi: Comitbanca Genova Lettera Di Conto Corrente
Tutti i fogli componenti questa lettera devono essere firmati

556 *Claimant's Exhibit 19.*

Lit. 1.526.048.48.—value September 10th, 1923, to the account of Messrs. Knauth, Nachod & Kuhne, and:
$300.— value September 10th, 1923 to their Dollars Account.

You will further find enclosed herewith statements of the Lire and Dollar Accounts, closed at today's date, showing the following balances:
Lit. 1.629.770.00.—in your favour, from which must be deducted:

$ 115.—balance of our Dollar Account in our favour.
557 $4000.—value March 5th., balance due to our Milan Office in their Dollar Account.
as also such sum as may be due to our New York in their Dollar Account with Messrs. K. N. & K.

Consequently, we have today passed telegraphic instructions to our New York Agency to pay you the sum of:

Lit. 1.629.770.00 —less
Lit. 220.00.—our cable expenses, viz:
Lit. 1.629.550.00.—after deducting from this amount:

$115 and $4000.—as stated above, together with
558 such amount as may be due to them.

We would thank you to acknowledge receipt of the enclosed lists and also to let us know when the enclosed statements have been found correct.

We are, Dear Sir,

Yours very truly,
Banca Commerciale Italiana,
Sede di Genova.

Encl: List of unpaid drafts.
3 Statements (2 Dollar &
1 Lire)

Telegrammi: Comitbanca Genova
Tutti i fogli componenti questa lettera devono essere firmati

Claimant's Exhibit 19A.

559

MESSRS. KNAUTH, NACHOD & KUHNE—UNPAID DRAFTS.

Issued by	Issued on		Amount	List No.	List dated
			1.174.098,08		
Nat. Bk—Los Angeles	Our Roma Office	Lit	600,—		
Trust Co—N. Kesing	id.	"	2.000,20		
Bk Buffalo—New York	id.	"	192,—		
id.	id.	"	610,—		
id.	Our Torino Office	"	2.222,—		
Bk—Rochester	Our Roma Office	"	20.000,20		
id.	id.	"	10.000,20		
Safe Dep. Bk.	id.	"	1.018,—		560
Nat. Bk—Scotdale	id.	"	335,40		
id.	id.	"	10.000,20		
Nat. Bk—Scranton	id.	"	100,—		
Exch. Nat. Bk	id.	"	40.100,20		
Nat. Bk—S. Bend	id.	"	5.500,—		
Title Trust	id.	"	5.000,—		
Nat. Bank	id.	"	25.000,—		
ty Trust—Butler	id.	"	2.500,—		
l Bk of New York	Our Salerno Office	"	400,—		
id.	id.	"	200,—		
Nat. Bank Pa.	id.	"	55,—		
id. Trinidad	Our Sassari Office	"	14.210,—		
id. id.	id.	"	24.360,—		
id. Telluride	Our Trento Office	"	142,—		
id. Trinidad	id.	"	7.480,—		
id. Gallupi	id.	"	412,—		561
id. Trinidad	id.	"	12.000,—		
id. Renovo	Our Trieste Office	"	600,—		
id. Warden	Our Udine Office	"	2.116,—		
id. Christopher	Our Vicenza Office	"	100,—		
of Eureka	Our Siracusa Office	"	191,—		
th Trust Co.	id.	"	100,—		
t Salt Lake	A. Pegazzano & C.—Massa	"	202,—		
State Bk	Our Torino Office	"	100,—		
olds Sav. Bk	id.	"	199,20		
of West Town	Our Trapani Office	"	100,—		
of Wierton—Wierton	Our Roma Office	"	1.250,—		
id.	id.	"	1.100,—		
id.	id.	"	1.100,—		
id.	id.	"	2.000,—		
id.	Our Trieste Office	"	10.000,—		
id.	Credito Fiumano—Fiume	"	2.000,—		
	TOTAL	Lit	1.526.148,48		

Claimant's Exhibit 198.

ACHOD & KUHNE Loro Conto Ordinario colla BANCA COMMERCIALE ITALIANA — Sede di Genova
New York chiuso al 10 Settembre 1923

Pagamento al nostro domicilio. Importo	Valuta	1923	Causale	Avere Importo	Valuta
51,738,351.88			Riporto.....	51,825,703.14	
1.—		Guigus 23	disp. 8284 annuall	158.—	Guizars 22
577.30		"	8450/171 "	12,500.—	" 22
395.85		"	8476/906 "	60.—	" 22
103,800.—		25 "	8322/548 "	450.—	" 25
Lit. 51,843,126.03		30	Interessi come da nota scalare	4,254.89	
Lit. 6.—					
157.55	Luizlis 12			Lit. 51,843,126.03	
65.60	24	1923			
358.90	27	Luiglio	1 Saldo Precedende	Lit. 103,800.—	Guizirs 30
		Settem	10 disposiziover annuall.	15,260,048.48	Settem 10
7.35			Interessi come de nota		
1,629,770.—			scalare	516.92	
Lit. 1,630,365.40				Lit. 1,630,365.40	
		1923			
		Settem	10 Salo Precedende	Lit. 1,629,770.—	Settem 10

S. E. & O.

Genova li 10-9-23

562

Claimant's Exhibit 198.

Sigg. KNAUTH, NACHOD & KUHNE Loro Conto Ordinario colla BANCA COMMERCIALE ITALIANA — chiuso al 10 Settembre
New York

1923	Dare Causale		Importo	Valuta	1923	Causale	
		Riporto	51,738,351.88				
Guigus 18	spese	.....	1.—		Guigus 23	disp. 8284 annuall	.....
30	Coumnt Massimo Debito come oto note	.....	577.30		"	8450/171 "	.....
	Spese postail, bolli e diverse	.....	395.85		"	8476/906 "	.....
	Saldo a Nuoro	.....	103,800.—		25 "	8322/548 "	.....
			Lit. 51,843,126.03		30	Interessi come da nota scalare	.....
1923							
563 Luiglio 3	spese R. d' R.	.....	Lit. 6.—				
12	spese telegrafi	.....	157.55	Luizlis 12			
25	"	.....	65.60	24	1923		
27	"	.....	358.90	27	Luiglio	1 Saldo Precedende	
Settem 10	Spese postail, bolli e diverse	.....	7.35		Settem	10 disposiziover annuall.	.....
	Saldo a Nuoro	.....	1,629,770.—			Interessi come de nota scalare	.....
			Lit. 1,630,365.40				
					1923		
					Settem	10 Salo Precedende	

S. E. & O.

Genova li 10-9-23

564

Trustee's Exhibit 1.

BANCA COMMERCIALE ITALIANA, GENOA LIRES

Form L 16 B—1000—2,23.

Date	Particulars	Debit Value Date	Posted From	Foreign Amount	Dollars	Dollars	Foreign Amount	Credit Posted From	Value Date		Pur
1923	Brought Forward			42,460,125.97	31,500.69	37,710.44	43,348,750.47				
May 11	Bot B. C. I. city	5/14	5/14/23	B922	150,000.	7,166.25	6,541.31	137,000.20	8460	5/21/23	Dft 27,000.
	To book dif. due on our purch. L. 150,000 on 5/9/23			7098	—	18.75					110,000.
14	Bot Guaranty Trust Co.	5/16	5/16/23	B968	250,000.	12,256.25					57,220.
	" Philad Natl Bk Pa.	5/15	5/15/23	B966	250,000.	12,162.50	5,179.52	107,220.	"	"	" 50,000.
	Coll. Themselves		5/25/23	8326	400,000.	19,360.	4,812.50	100,000.	14317	5/14/23	Sold American Sta
15	Bot Empire Trust Co city	5/18	5/18/23	B981	650,000.	31,606.25	4,812.50	100,000.	14316	"	" " "
							1,972.10	41,000.	8461	5/24/23	Dft
	" Banca di Roma city	5/16	5/16/23	B974	250,000.	12,237.50	2,859.	60,000.	14303	5/14/23	Sold D. M. Giuli &
	" " " "	5/16	"	B973	400,000.	19,590.		43,893,970.67			
					44,810,125.97		799.11	16,456.85	8462	5/24/23	Dft
18	Canc. dft 34308 — 8284		"	50056	158.	7.62	7,620.41	157,583.92	"	"	"
					44,810,283.97		1,466.06	29,972.60	"	"	To adj. dif on our
21	Bot East River Natl Bk city	5/23	5/23/23	B1046	250,000.	12,143.75	108.75	—	7221		"
	" Bca Nat. del Reduce city	5/22	5/22/23	B1035	250,000.	12,143.75	1,278.39	26,050.	8463	5/26/23	
	" Equitable Trust Co. city	5/23	5/23/23	B1045	250,000.	12,143.75	23,290.92	478,795.40	"	"	Dft
22	" Banca di Roma	5/25	5/25/23	B1064	250,000.	12,056.25	4,900.	100,000.	14409	5/17/23	Dft
	Canc dft 36923 — 8468		6/ 9/23	50072	1,915.	50.	4,875.	100,000.	14419	"	"
					45,811,298.97	194,443.31	4,840.	100,000.	14476	5/18/23	Sold Pittsburgh Sta
							133,066.01				" Mellon Natl B
							147.60	3,000.	14466	5/17/23	" Bd Bridge Bk.
							97.60	2,000.	14459	"	
							1,321.43	27,118.	8464		" First Natl Ban
											" " " "
							3,984.87	81,637.40	"	5/29/23	Dft 2,118
								45,016,584.84			25,000
							97.40	2,000.	14511	5/18/23	"
							97.40	2,000	14499	"	
							7,827.47	161,221.20	8465		Sold R. K. Babcock
							3,654.64	75,000.40	"	5/29/23	" Tampico Bkg.
							6,401.34	131,791.	6	5/29/23	Dft 111,221.20
							9,136.17	187,950.10	"	"	"
							17.01	350.	14550	5/19/23	"
							121.63	2,500.	14544	"	"
							1,231.55	25,300.	8467	6/ 1/23	Sold Morelli State B
							1,239.05	24,439.	14595	5/21/23	" Melechieri Bros.
								45,629,136.54			Dft.
							2,422.44	49,745.	8468	5/31/23	Sold Harry Geist &
							15,799.87	325,000.40	"	"	
							5,673.75	116,680.40	"	"	Dft.
							488.	10,000.	14534	5/22/23	"
							—	—.20	7567	5/ 2/23	"
							2,147.40	44,100.	8469	6/ 2/23	Sold Bca. N. Giovan
							9,585.81	197,508.60	"	"	To adj. dif. on dft
							24,300.	500,000.	14651	5/23/23	Dft
							24,150.	500,000.	14682	5/24/23	"
								47,372,171.14			Sold Bca Popolare
							5,228.68	107,781.	8470		" " "
											Dft. 7,781.
							17,861.70	370,055.	"	6/ 6/23	100,000.
											10,000.
							276,098.82	47,850,007.14			" 250,000.

Trustee's Exhibit 1.

565

BANCA COMMERCIALE ITALIANA, GENOA LIRES — Sheet No.

Debit						Credit						
	Value Date	Posted From	Foreign Amount	Dollars	Dollars	Foreign Amount	Posted From	Value Date	Particulars			Date 1923
			42,460,125.97	31,500.69	37,710.44	43,348,750.47						
	5/14	5/14/23	B922	150,000.	7,166.25	6,341.31	137,000.20	8460	5/21/23	Dft 27,000.20 5/21		May 11
150,000 on	5/9/23		7095	—	18.75					110,000. "		
	5/16	5/16/23	B968	250,000.	12,256.25					57,220. 5/21		
	5/15	5/15/23	B966	250,000.	12,162.50	5,179.52	107,220.	"	"	" 50,000. "		
		5/25/23	8326	400,000.	19,360.	4,812.50	100,000.	14317	5/14/23	Sold American State Bank Dt.	5/14	
	5/18	5/18/23	B981	650,000.	31,606.25	4,812.50	100,000.	14316	"	" " " " " "	5/14	
						1,972.10	41,000.	8461	5/24/23	Dft		12
	5/16	5/16/23	B974	250,000.	12,237.50	2,859.	60,000.	14303	5/14/23	Sold D. M. Giuli & Son, Milwaukee B. C. I.		
	5/16	"	B973	400,000.	19,590.		43,895,970.67					
				44,810,125.97		799.11	16,456.85	8462	5/24/23	Dft		14
		"	50056	158.	7.62	7,620.41	157,583.92	"	"	"		
				44,810,283.97		1,466.06	29,972.60	"	"	To adj. dif on our sale Lit. 300,000 to Pollock		
	5/23	5/23/23	B1046	250,000.	12,143.75	108.75	—	7221		"		
	5/22	5/22/23	B1035	250,000.	12,143.75	1,278.39	26,050.	8463	5/26/23			566
	5/23	5/23/23	B1045	250,000.	12,143.75	23,290.92	478,795.40	"	"	Dft		
	5/25	5/25/23	B1064	250,000.	12,056.25	4,900.	100,000.	14409	5/17/23	Dft		15
		6/ 9/23	30072	1,015.	50.	4,875.	100,000.	14419	"	"		
				43,811,298.97	194,447.31	4,840.	100,000.	14476	5/18/23	Sold Pittsburgh State Bank Pg. B. C. I.	5/17	
						133,066.01				" Mellon Natl Bank Pg. "	5/17	
						147.60	3,000.	14466	5/17/23	" Bd Bridge Bk. Chicago B. C. I.	5/18	16
						97.60	2,000.	14459	"			
						1,321.43	27,118.	8464		" First Natl Bank H. Fels R. Poutaguali		
										" " " " Hagleton C. Petronio		
						3,984.87	81,637.40	"	5/29/23	Dft 2,118 5/29		
							45,016,584.84			25,000 5/25		
						97.40	2,000.	14511	5/18/23	"		
						97.40	2,000	14499	"			
						7,827.47	161,221.20	8465		Sold R. K. Babcock & Co. city M. La Guaragua		17
						3,654.64	75,000.40	"	5/29/23	" Tampico Bkg. Co. M. A. Valedante		
						6,401.34	131,791.	6	5/29/23	Dft 111,221.20 5/29		
						9,136.17	187,950.10	"	"	"		
						17.01	350.	14550	5/19/23	"		18
						121.63	2,500.	14544	"	"		
						1,231.55	25,300.	8467	6/ 1/23	Sold Morelli State Bank Seu. T. Elia		
						1,239.05	24,439.	14595	5/21/23	" Melchieri Bros. Pa.—E. Tartaglini		
							45,629,136.54			Dft.		19
						2,422.44	49,745.	8468	5/31/23	Sold Harry Geist & Co. city—O. Tacetti		
						15,799.87	325,000.40	"	"			
						5,673.75	116,680.40	"	"	Dft.		21
						488.	10,000.	14534	5/22/23	"		
						—	—.20	7567	5/ 2/23	"		
						2,147.40	44,100.	8469	6/ 2/23	Sold Bca. N. Giovannangeli Dt. D. Anderson		
						9,585.81	197,508.60	"	"	To adj. dif. on dft 530,435—8403		
						24,300.	500,000.	14651	5/23/23	Dft		22
						24,150.	500,000.	14682	5/24/23	"		
							47,372,171.14			Sold Bca Popolare Fugazitfr—BCI	5/23	
						5,228.68	107,781.	8470		" " " " "	5/24	
										Dft. 7,781. 6/6		
						17,861.70	370,055.	"	6/ 6/23	100,000.		
										10,000. 6/6		
						276,094.82	47,850,007.14			" 250,000. 110,055.—6/6		

567

568

Trustee's Exhibit 2.

Rate	Dollar Amount
	3 354 90
	267 85
	51 45
	4 025 54
	1 886 07
	9 585 81

Advised by:
Checked by: B. H.
Approved:

569

Rate	Dollar Amount
48675	730 13
488	212 27
	942 40
4825	2 412 50
483¾	3 354 90

Advised by:
Checked by: B. H.
Approved:

Rate	Dollar Amount
487	267 85

570

Advised by:
Checked by: B. H.
Approved:

Rate	Dollar Amount
490	2 45
490	49 00
490	51 45

Advised by:
Checked by: B. H.
Approved:

Trustee's Exhibit 2. 571

Rate	Dollar Amount
489	694 87
"	1 191 20
489	1 886 07

Advised by:
Checked by: B. H.
Approved:

Rate	Dollar Amount
4875	29 74
484	449 16
	478 90
488	763 73
484	2 782 91
484⅝	4 025 54

572

Advised by:
Checked by: B. H.
Approved:

573

Trustee's Exhibit 3.

Founded 1852
K N & K
New York.

Refund Department.

KNAUTH, NACHOD & KUHNE
120 Broadway

..... New York, ...
.....
.....

GENTLEMEN:

We desire to have payment stopped on the following drafts. Kindly, therefore, cancel our advice of same and notify us promptly that you have done so.

Number	Amount	Drawn on	Drawn by	When Advised

192

Trustee's Exhibit No. 4.

KNAUTH, NACHOD & KUHNE
New York

Cancellation of Drafts to No.....
.....

We beg to inform you of the cancellation of the following Drafts, which are in our possession

Originally Advised							
Date	S. S. No.	Number	Drawn By	City	Drawn on	Currency	Amount

Sigg. KNAUTH, NACH

1923	Causale	DARE
		Riporto Li
Maggio 21	N Y. 89517	
"	92581	
"	—3	
"	—630	
"		spere
"	pag Tauetto f	
"	comenle "	
22	disp. list 8458	
"		"
"		"
"	" " 8459	
"	" " —8	
"	" " —7	
"		"
"	" " 8460	
"		"
"	All-o. fae. dolenico	
"	conveny e "	
"	disp. list 8459	
"	—60	
"	—"	
"	—57	
"		"
"		" Telig
23	boni fico Banca Pep.	fugay

A riportare Li

Trustee's Exhibit 5.

577

Rec'd Uun 11, 1923
Ans'd

Sigg. KNAUTH, NACHOD & KUHNE Loro Conto ordinario colla BANCA COMMERCIALE ITALIANA — Sede di Genova
New York al 25 Maggio—1923

	Pagamento al nostro domicilio.				AVERE	
	Importo	Valuta	1923	Causale	Importo	Valuta
Riporto Lit.	43,460,620.31					
.....	10,000.—	Maggio	21			
.....	50,000.—		21			
.....	60,000.—		21			
.....	50,000.—		21			
.....	1.—		"			
.....	24,439.		21			
.....	62.30		"			
.....	118,525.15		21			
.....	30.10		"			578
.....	1.—		"			
.....	29,400.20		21			
.....	63,864.50		21			
.....	60,400.—		21			
.....	11.30		"			
.....	11,979.25		21			
.....	4.70		"			
.....	10,000.—		22			
.....	33.—		"			
.....	104,627.40		21			
.....	57,220.—		21			
.....	27,000.20		21			
.....	14,997.45		21			
.....	45.70		"			
.....	24.90		"			
.....	500,000.—		23			579
A riportare Lit.	44,653,287.46					

S. E. & O.
Genova li 26-5-23

Trustee's Exhibit #5—Cont'd.

Riporto Lit.	44,653,287.46				Riporto Lit.	44,208,449.59	
.....	.30	"	Maggio 23	versf. merirt laveg of East River	.....	250,000.—	Maggio 23
.....	1.—	"	"	opo el. Milano—liquidat. librette	.....	19,639.75	22
.....	.30	"	"	"Credito of Equi trust	.....	250,000.—	23
.....	500,000.—	Maggio 24	Maggio 24	verf. creditor p.u.c.	.....	750,000.—	Maggio 24
.....	.30	"	25	" Banca Roma of ofsede Trini	.....	250,000.—	25
.....	41,000.—	24	"	of uineng	.....	400,000.—	25
.....	16,456.85	24					
.....	157,583.92	24					
.....	29,972.60	24					
.....	24.60	24					
.....	1.—	"					
.....	25,000.—	25					
.....	3,000.—	25					
.....	4.30	"					
.....	2,065.—	25					
.....	9.20	"					
.....	200.—	25					
.....	8.80	"					
.....	5.55	"					
.....	.30	"					
.....	1.—	"					
.....	.20	"					
.....	26,050.—	26					
.....	478,795.40	26					
.....	4.70	"					
ortare Lit.	45,933,472.78				Lit.	46,128,089.34	
.....	194,616.56						
Lit.	46,128,089.34		Maggio 26	Saldo Precedente	Lit.	194,616.56	Diverse

580 *Trustee's Exhibit #5—Cont'd.*

			Riporto Lit.	44,653,287.46			
Maggio 23		Spere	.....	.30	"	Maggio 23	versf. merirt laveg of East River
"		"	.....	1.—	"	"	opo el. Milano—liquidat. librette
"		"	.....	.30	"	"	"Credito of Equi trust
24	Conifico fugazi		.....	500,000.—	Maggio 24	Maggio 24	verf. creditor p.u.c.
"		"	.....	.30	"	25 "	Banca Roma of ofsede Trini
25	disp. list 8461 B.		.....	41,000.—	24	"	of uineng
" "	" 8462 A.		.....	16,456.85	24		
" "	" 8462 B.		.....	157,583.92	24		
" "	" 8462 C.		.....	29,972.60	24		
"		"	.....	24.60	24		
"		"	.....	1.—	"		
" "	" 8464 A.		.....	25,000.—	25		
581 "	pag T. Cianitinotto-Catania		.....	3,000.—	25		
"	conveny e spere		.....	4.30	"		
"	"P. Barbera—Lpoleto		.....	2,065.—	25		
"	conveny e	"	.....	9.20	"		
	Zelwig Deleoute-Fireys						
"	convey e	"	.....	200.—	25		
"		"	.....	8.80	"		
"		" Telig	.....	5.55	"		
"		"	.....	.30	"		
"		"	.....	1.—	"		
"		"	.....	.20	"		
25	disp. List 8463 A.		.....	26,050.—	26		
" "	" —B.		.....	478,795.40	26		
"		"	.....	4.70	"		
582			A riportare Lit.	45,933,472.78			
Maggio 26	Saleto Creditore		.....	194,616.56			
			Lit.	46,128,089.34		Maggio 26	Saldo Precedente

583

Trustee's Exhibit 6.

Rec'd Sep 25 1923
Ans'd

Segreteria B.

Genoa, September 7th, 1923.

MIDDLETON S. BORLAND, ESQ.,
Receiver for Messrs Knauth, Nachod & Kuhne,
NEW YORK.

DEAR SIR:

We are in receipt of your favour of the 24th. ult. and with regard to the first item you mention, 584
viz:
April 2nd. Lit. 2000,00.—Money Order 8426—
we have to inform you that we have no reference whatever to any such number, but presume that the item in question must be one of two orders passed to us by cable on April 2nd., viz:

1) Lit. 2000.—to Luigi Brandonisio fu Giuseppe of Carbonara, Bari, the payees receipt for which was duly mailed to Messrs. K. N. & K. on May 7th, 1923.
2) Lit. 2000.—to Filohena Trotta, Palazzo Pinto, Aversa, Caserta, the payees receipt for which was duly mailed to Messrs. K. N. & K. on April 19th, 1923. 585

As to the second item cited in your letter, viz: April 24th, 1923 Lit. 50.000.—Collection No. 8132— we regret to have to inform you that we find no trace of ever having received the transaction for execution.

Regarding the drafts you mention, viz:

586 *Trustee's Exhibit 6.*
Trustee's Exhibit 7.

May 18, 1923	Lit.	158,00	Cancelled Draft		34308/8284
May 29, 1923	"	450,00	"	"	419548/8322
June 6, 1923	"	2500,00	"	"	89135/8450
June 6, 1923	"	10000,00	"	"	89171/8450
June 8, 1923	"	60,00	"	"	733906/8476

we would refer you to our letter of June 25th, in which we credited you with the second draft listed above (Lit. 450.—) while the other four were passed to your credit in our letter of June 22nd. last.

We are, Dear Sir,

587 Yours very truly,
BANCA COMMERCIALE ITALIANA.
Sede di Genova.

Trustee's Exhibit 7.

August 24, 1923.
F. X. ACCTG.

BANCA COMMERCIALE ITALIANA,
Genoa, Italy.
Gentlemen,

I have examined your statements of the account of Knauth, Nachod & Kuhne as of June 15th, 1923, showing a balance in their favor of Lit.
588 87,351.26 and now wish to draw your attention to the following discrepancies:

WE CREDIT—YOU DO NOT DEBIT:

April 2, 1923 Lit. 2,000.00 Money order No. 8426 I surmise that this Money Order has not been effected. Will you kindly inform us as to the actual status of said order in order to enable me to make the necessary adjustments on my books.

Trustee's Exhibit 7. 589

WE DEBIT—YOU DO NOT CREDIT:

April 24, 1923	Lit. 50,000.00	Collection		#8132. Will you please inform me when you expect to collect this item and place the proceeds to my credit.
May 18, 1923	Lit. 158.00	Cancelled	Draft	#84308/8284
May 29, 1923	Lit. 450.00	"	"	#419546/8322
June 6, 1923	Lit. 2,500.00	"	"	#89135/8450
June 6, 1923	Lit. 10,000.00	"	"	#89171/8450
June 8, 1923	Lit. 60.00	"	"	#733906/8476

590

I am awaiting your letter confirming that you have taken note of the cancellation of the aforementioned drafts and that you have credited my account with the above amounts.

Kindly investigate the differences referred to above and advise me of the results at an early date.

Very truly yours,

MIDDLETON S. BORLAND,
Receiver.

591

598 *Report and Opinion of Special Master.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of

OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, doing
599 business as co-partners under the firm name and style of KNAUTH, NACHOD & KUHNE, and OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL and THEODORE W. KNAUTH, individually,
Bankrupts,
and
MARY W. KNAUTH,
Alleged Bankrupt.

In Bankruptcy No. 34986
Report No. 27 of the Special Master

600

Reclamation of

FIRST NATIONAL BANK OF TRINIDAD, COLO.

The petition of the First National Bank of Trinidad, Colorado, contains two causes of action. In the first cause of action it alleges the filing of an involuntary petition in bankruptcy against Knauth, Nachod & Kuhne on or about June 15, 1923, and the appointment of Middleton S. Borland as Receiver, and the subsequent election and

qualification of Middleton S. Borland as Trustee. It then alleges that prior to May 19, 1923, the bankrupts, to induce the petitioner to enter into trade relations with them, offered to accept from the petitioner from time to time sums of money, and use the same for the payment of drafts to be drawn by the petitioner on certain designated foreign correspondents of the bankrupts; that about May 19, 1923, the petitioner, in acceptance of said offer, drew its draft No. 61,161 on Banca Commerciale Italiana at Sassari, Italy, whereby it directed the said Italian Bank to pay to Zara Sanna Giovanni on presentment of said draft, the 602
sum of 24,360 lire; and that on or about the same day the petitioner delivered to the bankrupts the sum of $1,191.20 to be used for the payment of said draft on presentment, and not otherwise; that the bankrupts agreed with the petitioner to use same for the payment of said draft, and for no other purpose; that the bankrupts failed to cause said sum of $1,191.20 or any part of it to be used for the payment of said draft, and that the said sum has come into and is now in the possession and control of the Trustee.

The second cause of action alleges in addition to the above facts that there existed to the knowledge of the bankrupts a custom, 603
on the part of the bankrupts the Banca Commerciale Italiana to charge the account of the bankrupts with the amount of drafts drawn against it on the receipt of advice thereof from the bankrupts, and thereupon to set aside and appropriate said amount for the payment of said drafts when presented; that on or about May 22, 1923, the bankrupts notified the Banca Commerciale Italiana of the drawing of the said draft,

and requested the Banca Commerciale Italiana to charge the same to their account; that upon receipt of said advice, the Banca Commerciale Italiana, on or about June 4, 1923, with the knowledge and acquiescence of the bankrupts, set aside in a separate fund, and appropriated for the payment of said draft the sum of 24,360 lire, and charged the same to the bankrupts; that the Receiver, before the presentation or payment of said draft, instructed the Banca Commerciale Italiana not to pay it, and to return to him the amount so set apart and appropriated. Pursuant to said direc-
605 tion of the Receiver, the Banca Commerciale Italiana returned to him the moneys so set apart, and the same are now in the Trustee's possession; that the draft was duly presented and dishonored, and due notice thereof given to the Trustee.

The petitioner prays that it be adjudged to be entitled to, and have a lien upon the moneys in the hands of the Trustee in the amount of $1,191.20, with interest thereon from May 19, 1923, superior to all rights of the bankrupts of the Trustee or any creditor; and that the Trustee be decreed to pay said sum with interest to the petitioner out of the moneys in his hands.

606 The Trustee denies all the allegations in the petition except the filing of the petition and the appointment of a Receiver.

O'Brien, Boardman, Parker & Fox, Esqs.—For the Petitioner.

Rosenberg & Ball, Esqs.—for the Trustee.

Stephenson, Special Master: The bankrupt firm of Knauth, Nachod & Kuhne were dealers in foreign exchange, and sought the business of inland

banks who did not have connections with foreign banks. They sent to inland banks, including the petitioner in this case, a document entitled "List of Foreign Correspondents." This document referred to the world wide facilities for carrying on a foreign exchange business possessed by Knauth, Nachod & Kuhne, and contained a list of their foreign correspondents. These were banks located in cities throughout the world.

This document described three methods of effecting payment in foreign countries through the service offered by Knauth, Nachod & Kuhne.— (1) "K. N. & K. Drawing Service"; (2) "K. N. 608
& K. Money Order Service"; (3) "K. N. & K. Cable Transfers."

The facts in this case relate to the use of K. N. & K. Drawing Service. The terms and conditions of this service and the acceptance thereof by the petitioner constitute the contract in this case. Knauth, Nachod & Kuhne furnished the petitioner with blank draft forms bound in a book, together with appropriate blanks for advising Knauth, Nachod & Kuhne. The draft forms bore only the name of the petitioner. They were in the usual draft form with blanks for the use of the payee, the amount, the name of the drawee bank, and for 609
the signature of the petitioner. Upon receipt by Knauth, Nachod & Kuhne from the petitioner of an advice of draft, accompanied with adequate funds payable at par in New York at the rate quoted, Knauth, Nachod & Kuhne agreed to forward their advice of the same, and to "provide the drawee bank with funds sufficient for the payment of the draft abroad, by a transfer of credit from our balance, or otherwise, provided the draft is drawn on a bank named in our latest list of

610 *Report and Opinion of Special Master.*

correspondents." Lost drafts would be replaced, after the cancellation of the original draft had been effected, abroad, and re-transfer of credit received by Knauth, Nachod & Kuhne, upon furnishing a bond of indemnity. Knauth, Nachod & Kuhne agreed to redeem unpaid drafts at the buying rate prevailing at the time they were presented for redemption, and not in the amount paid for the original draft. In case the funds received by Knauth, Nachod & Kuhne with the advice should be less than the quoted rate, Knauth, Nachod & Kuhne had the right either to hold the
611 same and advise the petitioner of the deficit or to advise the draft abroad and require the petitioner to remit the deficit. If the funds received were more than the quoted rate, Knauth, Nachod & Kuhne could either advise the petitioner of the excess or advise the draft abroad and return the excess to the petitioner.

The document, after describing what Knauth, Nachod & Kuhne agrees to do, states as follows:

> "Under this arrangement, our correspondents in this country act as PRINCIPALS, and issue drafts in their own names, our name not appearing thereon. In other
612 words, we are employed merely as the agents of the drawers for the purpose of advising the issue of their drafts and providing the drawee banks with sufficient funds to cover their payment."

On May 19, 1923, the bankrupts notified the petitioner that the rate for 24,360 Italian lire on that day would be .0489 per lire. Thereupon the petitioner drew its draft No. 61,161 for 24,360 lire, payable to Zara Sanna Giovanni or order, on

the Banca Commerciale Italiana, Sassari, Italy, using one of the blanks, furnished it by Knauth, Nachod & Kuhne. The petitioner sent Knauth, Nachod & Kuhne an "advice," which stated that pursuant to the terms and conditions covering Knauth, Nachod & Kuhne's drawing service, the petitioner sold a draft bearing No. 61,161 for 24,360 lire, and requested Knauth, Nachod & Kuhne to protect the same upon presentation. It gave the name of the payee and the name of the bank on which it was drawn, and stated that the sum of $1,191.20 was remitted which was at the rate of .0489 quoted. The petitioner, with this advice, 614
sent to the bankrupts $1,191.20, which was included in the petitioner's check for $3,518.95. The check included moneys sent in connection with other advices of the same character. This advice and the check were received by the bankrupts on May 22, 1923, and receipt thereof acknowledged. The check was deposited by the bankrupts in their general checking account in the Guaranty Trust Company on May 22, 1923, and the bankrupts received credit therefor on that day. Thereafter on May 22, 1923, the bankrupts mailed to the Banca Commerciale Italiana at its general office six papers known as the "Steamer Block," and a duplicate thereof was mailed to the Sassari 615
branch of the Banca Commerciale Italiana. This "Steamer Block" contained a list of drafts issued by inland banks, and by the bankrupts themselves, giving the number of each draft, the name of the drawer, the address of the drawer, the date, the name of the person in favor of whom the draft was drawn, and the amount of the draft in lire, and requested the Banca Commerciale Italiana to "honor the above listed drafts, charging the same to our account." Among the drafts

616 *Report and Opinion of Special Master.*

listed was the one above referred to, No. 61,161, drawn by the First National Bank of Trinidad, Colorado, in favor of Zara Sanna Giovanni for 24,360 lire.

The bankrupts carried an account in lire with the Banca Commerciale Italiana, and the relation between the bankrupts and the Italian bank was that of depositor and banker. The bankrupts credited the Italian Bank with the drafts drawn by them on that bank, with all advices to pay drafts issued by other parties, including the petitioner in this case, with cable transfers sold,
617 and with any other direction to pay given the Italian Bank. The bankrupts charged the Italian bank with cable transfers purchased for their account in this bank, and with any other form of remittance or transfer made for their account to the Italian bank. These debit and credit entries were made in the bankrupt's books at the time of the issuance of the draft or of the advice to pay, and the case of advices and drafts sent by mail, the credit given by the bankrupts to the Italian bank would occur before the arrival of the advice or draft, and before the corresponding charge would be made by the Italian bank. At certain times also, the bankrupts had the right,
618 by agreement with the Italian bank, to overdraw or over-advise their account within limited amounts.

The aforesaid "Steamer Block" was received by the Banca Commerciale Italiana on or before June 4, 1923, and the account of Knauth, Nachod & Kuhne was debited with the aggregate amount of the drafts referred to in the Steamer Block, and simultaneously on its books, an account termed "Drafts Payable" was credited with such amount. In this account were also credited

amounts of drafts advised to the Banca Commerciale Italiana for payment by other depositors or clients of the Banca Commerciale Italiana, in addition to the bankrupts. This practice was recognized as proper by the bankrupts. Interest was allowed to the bankrupts on the amount of the balance standing to their general credit. No interest was allowed by the Banca Commerciale Italiana on the account termed "Drafts Payable" and the only compensation received by the Banca Commerciale Italiana for their service in honoring drafts was the use of the funds standing to the credit of the account termed "Drafts Payable." 620

It is the practice in international banking transactions for the drawee bank, upon receipt of advice that a draft had been drawn against it, immediately to charge the current account of its client with the amount advised, and to credit another account known as "Unpresented Drafts Drawn" or some similar designation, and it is also the practice in foreign banking transactions, upon receipt by the drawee bank of directions to cancel any advice theretofore given, immediately to cancel the same, and recredit the client in its account current, without the client's assigning any reason for such cancellation. This procedure began at a time when banks did not have the facilities of suddenly raising cash; and, when they were notified by a client of what they would have to meet, they immediately put themselves in possession of sufficient cash to meet their obligations. Originally they held this money apart, practically earmarked to meet the advised obligations, and no interest was paid on same. With the change in banking facilities, which enabled banks, by 621

means of rediscounts and call loans, to raise cash on short notice, the practice of setting aside funds was discontinued, but the practice of not paying interest on the amount of advised drafts was continued. Such practice was followed by Knauth Nachod & Kuhne in its dealings with Banca Commerciale Italiana, but cancellation advices were not given by Knauth, Nachod & Kuhne to the Banca Commerciale Italiana in the case of drafts issued by inland banks, except upon request by the inland bank so to do.

623 After the Receiver was appointed, he had communications with the Banca Commerciale Italiana, and pursuant to his direction, the Italian bank recredited all amounts standing in their drafts payable account which had not been paid, and remitted the amount thereof to the Receiver. The draft in question in this case was presented to the Banca Commerciale Italiana and dishonored. It was then returned to the purchaser thereof, Bachesio Tabasco, and thereupon the petitioner paid to Bachesio Tabasco the sum of $1,128.87. Bachesio Tabasco delivered the said draft to the petitioner.

624 It was known to Knauth, Nachod & Kuhne that between the time of the sending of a steamer block or draft and the time it would be presented, a certain interval of time would elapse, and based upon such estimation, they would provide funds usually by cable transfer to meet the drafts at the time of presentation.

Under its first cause of action, the petitioner seeks to recover the amount paid by it to the bankrupts, and offers to trace this amount into the hands of the Trustee. It claims that as to this amount the bankrupts were Trustees. The

625

decision of this question must turn on a determination as to what the agreement was between the petitioner and the bankrupts. To my mind, the contract, reduced to its lowest terms, is simply a promise by the bankrupts in consideration of the money paid to them by the petitioner, to provide the drawee bank with funds to pay the draft upon presentation. The means to be used by the bankrupts to accomplish this purpose are entirely of their own choosing. It is contended that the statement in the terms and conditions of the drawing service that "we are employed merely as the agents of the drawers for the purpose of advising the issue of their drafts and providing the drawee banks with sufficient funds to cover their payment" proves the relation of principal and agent between the petitioner and Knauth, Nachod & Kuhne, and that Knauth, Nachod & Kuhne assumed a fiduciary obligation as to the money received by it from the petitioner. But the relation of principal and agent does not follow the mere use of those words. (*Beecher* vs. *Cosmopolitan Trust Company*, 239 Mass., 48). The existence or non-existence of such relationship must be determined from the whole contract. Clearly, it was not intended that Knauth, Nachod & Kuhne should represent or act for or derive their authority from the petitioner, or that they should be subject to the control and direction of the petitioner. Knauth, Nachod & Kuhne contracted to produce a specified result, namely, to provide the drawee bank with sufficient funds to meet the drafts. In producing this result, they could use their own means and select their own agents free from the control of the petitioner. They were independent contractors. (*Casement* vs. *Brown*

626

627

148 U. S., 615; *Insurance Company* vs. *Shipping Board*, 290 Fed., 182). It certainly was not the intention of the parties that the petitioner assume the risk of loss of the fund received by Knauth, Nachod & Kuhne, or that Knauth, Nachod & Kuhne should keep such fund separate from its own funds, or assume the obligation to account for the same.

It is contended that the petitioner paid this money to Knauth, Nachod & Kuhne for a specific purpose; that it was not a general deposit by which the petitioner became a creditor and
629 Knauth, Nachod & Kuhne a debtor, and that the decisions hold that money deposited with a bank for a specific purpose is held by the bank in trust. In any business transaction, one who pays money to another pays it for a specific purpose. A may give money to B for B's specific promise to build him a house, or A may give money to B for B's promise to pay him back on demand—the usual relation of depositor and banker. Or A may give money to B for B's promise to provide adequate funds to meet A's drafts—that is this case. If A entrusts money to B with the intention that B use that particular money to buy a horse for A,
630 then B becomes A's agent, and the money remains A's. In the first case, A gives the money to B in return for B's promise. In the latter case, B is acting for A, and under his direction, and subject to his control. It is, therefore, immaterial whether B's promise is specific or general. The essential element is what A and B agree as to the ownership of the money paid. In this case, the parties could not have intended the ownership of the money paid by the petitioner to remain in it. It was the bankrupt's consideration for their

promise to provide funds to meet a draft. It is, furthermore, immaterial that Knauth, Nachod & Kuhne did not credit the petitioner with the amount received by them, for they did not agree to return the money; they agreed to provide funds to meet a draft drawn by the petitioner. Instead of a promise by Knauth, Nachod & Kuhne to return the money, the petitioner accepted a promise by Knauth, Nachod & Kuhne to provide funds to meet a draft drawn by it. In neither case is a trust relationship established.

Beecher vs. *Commonwealth Trust Company*, supra, decides, under facts which are practically 632
the same as the facts in this case, that there is no trust relationship, and that the sole obligation of the bank is contractual.

Ligniti vs. *Mechanics & Metals National Bank*, 230 N. Y., 415, holds that there is no trust relationship where money is paid to a bank for the bank's agreement to provide foreign funds by cable. The principle involved in the *Ligniti* decision applies to this case. In the *Ligniti* case, the bank promised that the foreign bank, upon receipt of cable, would pay the beneficiary named in the cable. In this case the bankrupts promised to have funds at the drawee bank to meet a draft 633
drawn by the petitioner when it should be presented. If there was no trust relationship in the *Ligniti* case, there can be none in this case. The same principle was recognized in *Gravenhorst* vs. *Zimmerman*, 236 N. Y., 22; *Safian* vs. *Irving National Bank*, 202 App. Div., 459, affirmed 256 N. Y., 513; *Taussig* vs. *Carnegie Trust Company*, 156 App. Div., 519; *Kuhne* vs. *Union Trust Company*, 131 Mich., 602; *Samuels* vs. *E. F. Drew & Company*, 296 Fed., 882.

634 *Report and Opinion of Special Master.*

All the above cases represent the more recent decisions of the Courts in the cases dealing with transmission of funds through the use of banking facilities. These decisions take notice of banking practice and the adoption thereof by persons transmitting money to foreign countries. In so far as they are inconsistent with previous decisions, they should control.

The decisions which hold a trust relationship are based upon findings by the courts of an agreement to devote or use the actual money paid the transmitting bank or the actual proceeds of such
635 actual money for the purpose agreed upon.

In re *Jarmulowsky*, 258 Fed. 231, money was to be forwarded to a definite person at a specified place in Europe, and it was understood that the Jarmulowskys were to act as agents only for the sender. This was held trust money, for it appears that the Jarmulowskys were to *forward* the money *only* as agents for the sender. They did not agree to provide funds to meet drafts.

In re *Bologuesi*, 254 Fed. 770, money was given to the bankrupt for investment in a specified manner. The Court held that there was a trust relation. In that case, the bankrupt was to act for the claimant and to purchase drafts and money
636 orders for the claimant and (probably) in his name. The bankrupt there was like a stock broker who accepts money to purchase a specific stock for his customer (*Johnson* vs. *Brooks*, 93 N. Y. 342).

City of St. Louis vs. *Johnson*, 5 Dillon 241 and *Cutler* vs. *American Exchange National Bank*, 113 N. Y., 593 were cases where banks accepted money to be remitted to another bank, and the Court held that a trust relationship was estab-

lished. The Court found in those cases, as expressed in *Cutler* vs. *American Exchange National Bank, supra,* that when the same was paid into the remitting bank, "From that moment, the defendant became a depositary of a fund, which was, by its own agreement, devoted to one particular purpose and to no other." Assuming that the agreement was as the Court found, the decision agrees with the principles above mentioned. Whether after the decision in *Ligniti* vs. *Mechanics & Metals National Bank, supra,* the Court would have found that the bank really made such an agreement is doubtful, but in the case at 638
bar, Knauth, Nachod & Kuhne expressly made another agreement. They did not agree to *devote* the funds deposited with them by the petitioner to a particular purpose, but agreed to provide funds to meet a draft when presented at the bank in Italy.

In my opinion, therefore, the petitioner is not entitled to recover under its first cause of action.

Under its second cause of action, the petitioner claims that there was an equitable assignment of so much of the bankrupts' claim against the Banca Commerciale Italiana as was necessary to pay the drafts issued by it. There is no evidence in the dealings between the petitioner and the bank- 639
rupts which shows that either party intended that the petitioner have an equitable assignment or an equitable lien upon any claim the bankrupt may have against the Italian bank. The petitioner had no such intention since the bankrupts did not represent that they had or would have any credit balance against the Italian bank, nor did they agree with the petitioner to establish any such credit balance. The bankrupts had no such intention since they created no credit balance

640 *Report and Opinion of Special Master.*

against the Italian bank specifically to meet the draft drawn by the petitioner. They made such deposits in the Italian bank as were necessary from time to time to meet their obligations. Their method of dealing with the Italian bank was no different from the method of dealing used by an ordinary depositor in his bank. The ordinary depositor maintains such balance as he deems necessary to be available for his needs.

The evidence further shows that the bankrupts at all times, by arrangement with the Italian bank, retained control of all advices sent it, and
641 could cancel such advices at any time. The maintaining of such control shows an intent that there be no assignment. (Re *Interborough Consolidated Corporation*, 288 Fed. 334; *Noyes* vs. *First National Bank*, 180 App. Div. 162, affirmed 224 N. Y. 542).

Equitable liens or equitable assignments should not be created unless necessary to effect the intention of the parties to a contract. Here there is no evidence that the parties contracted or intended that the petitioner have any property right in any right the bankrupts may have against the Italian bank. The bankrupts did not sell to the petitioner or agree to sell any such right.
642 Hence *Fourth Street National Bank* vs. *Yardley*, 165 U. S. 634 does not apply. In the Yardley case, the Court found an intention by the parties that the payee of a draft be secured by an assignment of the drawer's right against the drawee. See *Eastman Kodak Company* vs. *Park National Bank*, 231 Fed. 220, affirmed C. C. A., Second Circuit, 247 Fed. 1002. This case fully discusses the law applicable to equitable assignments, and reviews the cases dealing therewith.

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"In dealing with transactions of this kind, we may go far in giving them any form that will carry out the mutually understood intent. *Sexton* vs. *Kessler*, 225 U. S. 90, 96, 97. But if the intent was doubtful or inconsistent with the legal effect of dominant facts, it must fail. For instance, apart from possible exceptions, a man cannot retain a domicile in one place when he has moved to another and intends to reside there for the rest of his life, by any wish, declaration or intent inconsistent with the dominant facts of where he actually lives and what he actually means to do. *Dickinson* vs. *Brookline*, 181 Massachusetts, 195. In the present case it is agreed that it was expected and understood that no portion of the clearance loan was to be used for any purpose other than to clear securities. But on the other hand, by consent of the bank as it seems, the loan was put into the general deposit account, which was drawn upon for general purposes, at least to the extent of the balance above the loan; the securities released were not kept separate but were used like any others; and no separate account was kept of money received from deliveries of stock so released. What happened as between these parties was simply that all monies received in the course of the day from whatever source went into the firm's deposit account with the bank. So that, even if we take it, as a corollary of what was understood, that the use of the clearance loan was expected to enable the firm

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646 *Report and Opinion of Special Master.*

to repay the loan, it does not appear to have been expected that the proceeds should be appropriated specifically to that end, but simply that the addition of such proceeds to the general funds of the firm would enable the latter to pay within the time allowed."

(*National City Bank* vs. *Hotchkiss*, 231 U. S. 50, at 56).

It is claimed, even admitting that Knauth, Nachod & Kuhne became the owner of the funds
647 paid it by the petitioner, that when they established a credit with the Banca Commerciale Italiana, they held such credit in trust for the benefit of the Petitioner *pro tanto*, and in support of this contention, the petitioner refers to an article by Dean Stone in 21 Columbia Law Review 507. In this article, it is suggested that when the banker has once acquired a credit for transmitting the funds, then any right which the banker thus acquired against the correspondent specifically for the purpose of effecting the transfer may be treated as a *quasi* trust fund held for the benefit of his customer.

648 "In the *Ligniti* case, the banker failed before he had taken any steps to procure the credit pursuant to contractual obligation. Had he actually acquired the credit and specifically appropriated it or a part of it to his undertaking for account of the plaintiff, a very different situation would have arisen and one on which the plaintiff might properly have based a claim that the credit so far as it was an enforceable one

was held by the banker in a fiduciary capacity for the plaintiff."

(21 Columbia Law Review, at 522).

Undoubtedly, as suggested by Dean Stone, the banker could become a Trustee for his customer of his chose in action against the correspondent. But in this case it appears that the parties had no such intention. The bankrupts were under no obligation to create any credit in their favor, and appropriate such credit for the use of the petitioner. Evidently, the petitioner did not intend 650
that it have any property right in any claim by the bankrupt against the Italian bank. In fact, what the petitioner wanted and what it contracted for was that funds should be available in the bank in Italy when the draft was presented, and to accomplish this purpose, it accepted the bankrupts' promise so to do.

The petitioner has not, therefore, established any equitable assignment or lien upon Knauth, Nachod & Kuhne's credit with the Banca Commerciale Italiana.

February 19, 1925.

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Exceptions to Report of Special Master

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and 653 THEODORE W. KNAUTH, doing business as co-partners under the firm name and style of KNAUTH, NACHOD & KUHNE, and OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL and THEODORE W. KNAUTH, individually, Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	In Bankruptcy, No. 34,996.

654

NOW comes FIRST NATIONAL BANK OF TRINIDAD, the reclaimant and petitioner herein and hereby excepts to report No. 27 of Hon. Robert P. Stephenson, to whom as Special Master has been referred the reclamation petition of FIRST NATIONAL BANK OF TRINIDAD and the answer thereto, and petitioner excepts to said report on the ground that the Special Master erred in finding—

1. That the bankrupts were dealers in foreign exchange.

2. That the bankrupts acted as independent contractors in their dealings with petitioner, and did not act as agents or fiduciaries of the petitioner.

3. That it was not intended that the bankrupts should represent or act for or derive their authority from the petitioner or that they should be subject to the control and direction of the petitioner or that they should keep the funds separate or assume the obligation to account therefor.

4. That a trust relationship was not established between the bankrupts and the petitioner. 656

5. That the bankrupts did not agree to devote the funds deposited with them by the petitioner to a particular purpose.

6. That the bankrupts did not become trustees of the moneys delivered to them by petitioner under the terms of the drawing service.

7. That at certain times the bankrupts had a right by agreement with the Italian Bank to overdraw or over-advise their account within limited amount.

8. That the only compensation received by the Italian Bank for their services in honoring drafts was the use of the funds standing to the credit of the account termed "drafts payable." 657

9. That it is the practice in foreign banking transactions upon receipt by the drawee bank of directions to cancel any advice theretofore given, immediately to cancel the same and re-credit the client in its current account without the client's assigning any reason for such cancellation.

10. That the contract between the parties was simply a promise by the bankrupts in considera-

658 *Exceptions to Report of Special Master.*

tion of the money paid to them by the petitioner, to provide the drawee bank with funds to pay the draft upon presentation.

11. That it was not the intention of the parties that the ownership of the moneys paid by the petitioner should remain in it but that these moneys were the bankrupts' consideration for their promise to provide funds to meet a draft.

12. That there is no evidence which shows that either party intended that the petitioner have an equitable assignment or an equitable lien upon
659 any claim the bankrupt might have against the Italian Bank.

13. That the bankrupts did not represent that they had or would have any credit balance against the Italian Bank and did not agree to establish any such credit balance.

14. That the bankrupts did not create any credit balance against the Italian Bank specifically to meet the draft drawn by petitioner.

15. That the method of dealing between the bankrupts and the Italian Bank was no different from the method of dealing used by an ordinary
660 depositor in his bank.

16. That the bankrupts, at all times, by arrangements with the Italian Bank, retained control of all advices sent to it and could cancel such advices at any time.

17. That there is no evidence that the parties contracted or intended that the petitioner have any property right in any right the bankrupts may have had against the Italian Bank and that

the bankrupts did not sell or agree to sell any such right to the petitioner.

18. That there was no intention that the bankrupts should become a trustee for the petitioner.

19. That the bankrupts were under no obligation to create any credit in their favor and appropriate such credit for the use of the petitioner.

20. That the petitioner did not intend that it have any property right in any claim by the bankrupts against the Italian Bank.

662

21. That what the petitioner wanted and what it contracted for was that funds should be available in the bank in Italy before the draft was presented and to accomplish this purpose it accepted the bankrupts' promise so to do.

22. That the petitioner has not established any equitable assignment or lien upon the bankrupts credit with the Banca Commerciale Italiana.

23. That the petitioner was not entitled to the relief demanded in the petition.

WHEREFORE, the petitioner prays the court that said exceptions to the report of the Special Master herein may be sustained. 663

FIRST NATIONAL BANK OF TRINIDAD
By O'BRIEN, BOARDMAN, PARKER & FOX,
Attorneys,
120 Broadway,
Borough of Manhattan,
City of New York.

664

Notice of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of OSCAR L. GUBELMAN, etc., trading as KNAUTH, NACHOD & KUHNE, etc., Bankrupts.	In Bankruptcy No. 34,996.

665

Please take notice that the undersigned will move this Court at a Stated Term thereof to be held in Room 235 of the Old Post Office Building, Borough of Manhattan, City of New York on the 4th day of March, 1925, at 10.30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order confirming Report No. 27, of the Special Master and relating to the reclamation claim of the First National Bank of Trinidad, Colo.; and for such other and further relief as to this Court seems just and proper in the premises.

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Yours, etc.,

ROSENBERG & BALL,
Attorneys for the Trustee,
74 Broadway,
Borough of Manhattan,
New York City.

To: O'BRIEN, BOARDMAN, PARKER & FOX, Esqs.,
Attorneys for the First National Bank,
of Trinidad, Colo.,
120 Broadway, New York City.

Opinion of the District Court.

667

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, etc., trading as KNAUTH, NACHOD & KUHNE, etc., Bankrupts.	B-34996.
In the Matter *of* THE RECLAMATION CLAIM OF THE FIRST NATIONAL BANK OF TRINIDAD, COLORADO.	668

O'BRIEN, BOARDMAN, PARKER & FOX, Esqs., attorneys for claimant, (William De Forest Manice, Allen R. Memhard, and George Trosk, of counsel).

ROSENBERG & BALL, Esqs., attorneys for the Trustee, (Godfrey Goldmark, George G. Ernst, and Ralph F. Colin, of counsel).

KNOX, D. J. 669

The law finally to be applied to the subject matter of this controversy between claimant and the trustee in bankruptcy of Knauth, Nachod & Kuhne will be declared by the Appellate Court, and my views concerning the same are of fleeting importance. They will not, therefore, be set forth at length. A further reason is that the Special Master has filed an elaborate and able opinion in which he reviews both the facts and the law.

670 *Opinion of the District Court.*

As to the alleged right to recover upon the first cause of action, it may be said that I believe the maximum engagement between claimant and the bankrupts to have been that the latter, in consideration of their receipt of a sum of money, merely agreed, as independent contractors, that they would provide funds or credits of their own in a designated foreign bank with which a particular draft, drawn by claimant, would, upon presentation, be paid. I do not believe that there was, as between claimants and bankrupts, a fiduciary relationship. True, the bankrupts did refer to
671 themselves as agents of the claimants

> "for the purpose of advising the issue of their drafts and providing the drawee banks with sufficient funds to cover their payment."

But agency usually implies some element of direction and control of the agent by the one who appoints him, as to the manner and method in which a particular duty shall be carried out. While the presence of such element is perhaps not always decisive of the existence of the relationship of principal and agent, it is, in this case, conspicuous by its absence.

672 Furthermore, the terms and conditions by which the bankrupts placed their "drawing service" at the disposal of inland banks, seems (aside from the designation of themselves as "agents") reasonably specific that they should act independently, and upon their own account. Any ambiguity must be resolved by the intention of the parties. Upon this, I think the position of the Trustee is supported by the facts. I cannot believe that claimant ever thought or understood that it as-

sumed any risk of loss by the bankrupts of the funds placed in their hands.

For these reasons, there can be no recovery upon the first cause of action. Favorable decision in this court upon claimant's second alleged right is foreclosed by my ruling of April 22, 1925, on the claim of Henry G. Gray in the Estate of Zimmermann & Forsbay, alleged bankrupts.

The exceptions to the report of the Special Master are overruled, and it is confirmed.

April 25, 1925.

674

Order Confirming Special Master's Report.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, *et al.*, trading as KNAUTH, NACHOD & KUHNE, etc., Bankrupts.	In Bankruptcy No. 34996. 675
In the Matter *of* Reclamation Claim of FIRST NATIONAL BANK OF TRINIDAD Trinidad, Colo.	

This matter having duly come on to be heard on March 18, 1925, upon motion of Rosenberg & Ball, attorneys for the Trustee herein, for an

676 *Order Confirming Master's Report.*

order confirming report No. 27 of the Special Master herein,

Now, upon reading and filing said report of the Special Master and the papers referred to therein and thereto annexed, and upon all of the proceedings had herein, it is, after due consideration, on motion of Rosenberg & Ball, attorneys for the Trustee herein,

ORDERED that the said report of the Special Master be and the same hereby is in all respects except as to costs and disbursements confirmed,
677 and the reclamation claim of First National Bank of Trinidad, Trinidad, Colo., be and the same hereby is dismissed; and it is

FURTHER ORDERED that the Trustee be and he hereby is authorized and directed to pay Robert P. Stephenson, as Compensation for his services as Special Master herein, $1,000.

Dated, New York, May 5, 1925.

JNO. C. KNOX,
U. S. D. J

678

Petition for Appeal to the Circuit Court of Appeals. 679

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL, MARY W KNAUTH and THEODORE W. KNAUTH, doing business as co-partners under the firm name and style of KNAUTH, NACHOD & KUHNE, and OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL and THEODORE W. KNAUTH, individually, Bankrupts, 680

and

MARY W. KNAUTH, Alleged Bankrupt.

In Bankruptcy No. 34996.

In the Matter

of

THE RECLAMATION CLAIM OF THE FIRST NATIONAL BANK OF TRINIDAD, COLORADO. 681

TO THE HONORABLE THE DISTRICT JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The First National Bank of Trinidad, Colorado, your petitioner, conceiving itself aggrieved by the certain order and decree in the above entitled proceeding, dated the 5th day of May, 1925, and filed in the office of the Clerk of this Court on the 5th day of May, 1925, confirming report

682 *Petition for Appeal to the Circuit Court of Appeals.*

No. 27 of Robert P. Stephenson, Special Master, dated the 19th day of February, 1925, which denied your petitioner's motion to require the Trustee herein to turn over to it the sum of $1,191.20, does hereby petition for an appeal from the said order and decree to the United States Circuit Court of Appeals for the Second Circuit, and prays that its appeal may be allowed and a citation granted directed to Middleton S. Borland, the Trustee in Bankruptcy herein, demanding him to appear before the United States Circuit Court
683 of Appeals for the Second Circuit to do and receive what may appertain to justice to be done in the premises and that a transcript of the record, proceedings and evidence in said proceeding, duly authenticated may be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, July 31, 1925.

FIRST NATIONAL BANK OF TRINIDAD, COLO.,
By O'BRIEN, BOARDMAN, PARKER & FOX,
Attorneys for the Petitioner,
120 Broadway,
New York City.

684 The foregoing appeal is hereby allowed.
Dated, New York, August 3rd, 1925.

JXO. C. KNOX,
U. S. D. J.

We hereby waive the filing of a bond or other undertaking for the damages and costs upon the appeal to the Circuit Court of Appeals referred to in the foregoing petition.

Dated, New York, August 3rd, 1925.

ROSENBERG & BALL,
Attorneys for Trustee.

Notice of Appeal. 685

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH, and THEODORE W. KNAUTH, doing business as co-partners under the firm name and style of KNAUTH, NACHOD & KUHNE, and OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL and THEODORE W. KNAUTH, individually, Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	In Bankruptcy No. 34996.
In the Matter *of* THE RECLAMATION CLAIM OF THE FIRST NATIONAL BANK OF TRINIDAD, COLORADO.	

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687

SIRS:

PLEASE TAKE NOTICE that the First National Bank of Trinidad, Colorado, appeals to the United States Circuit Court of Appeals for the Second Circuit to be held at the United States Court, Post Office Building, Borough of Manhattan, City of New York, from an order and decree of the United States District Court for the Southern District of New York made by Honorable John C. Knox, one of the judges thereof, dated the 5th

688 *Notice of Appeal*

day of May, 1925, and filed in the office of the Clerk of this Court on the 5th day of May, 1925, confirming the report No. 27 of Robert P. Stephenson, Special Master, dated February 19, 1925, which denied the motion of First National Bank of Trinidad, Colorado, to require the Trustee herein to turn over to it the sum of $1,191.20.

Dated, New York, August 3, 1925.

Yours, &c.,

O'Brien, Boardman, Parker & Fox,
Attorneys for Petitioner,
689 120 Broadway,
New York City.

To Messrs. Rosenberg & Ball,
Attorneys for Middleton S. Borland,
Trustee in Bankruptcy,
Knauth, Nachod & Kuhne,
74 Broadway,
New York City.

Alexander Gilchrist, Jr., Esq.,
Clerk of the U. S. District Court,
for the Southern District of New York.

690

Citation on Appeal.

691 By the Honorable John C. Knox, one of the United States District Court Judges for the Southern District of New York, in the Second Circuit.

To Middleton S. Borland, Trustee in Bankruptcy of Oscar L. Gubelman, Rollin C. Newton, James F. Shaw, Herbert B. Smithers, John R. Hall, Mary W. Knauth and Theodore W. Knauth, doing business as co-partners under the firm name and style of Knauth, Nachod & Kuhne, and Oscar L. Gubelman, Rollin C. Newton, James F. Shaw, Herbert B. Smithers, John R. Hall and Theodore W. Knauth, individually, Greeting.

692 You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named on the 1st day of September, 1925, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein you as trustee in bankruptcy of the above named bankrupts are appellee, and the First National Bank of Trinidad, Colorado, is the appellant, and you are ordered to show cause, if any there be, why the order and decree in said appeal mentioned should not be 693 corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named this 3rd day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-five, and of the Independence of the United States the One Hundred and Fiftieth.

Jno. C. Knox,
United States District Judge for the Southern District of New York, in the Second Circuit.

694 **Assignment of Errors.**

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, doing business as co-partners under the firm name and style of KNAUTH, NACHOD & KUHNE, and 695 OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL and THEODORE W. KNAUTH, individually, Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	In Bankruptcy No. 34996.
In the Matter *of* THE RECLAMATION CLAIM OF THE FIRST NATIONAL BANK OF TRINIDAD, COLORADO.	

696 Now comes the First National Bank of Trinidad, Colorado, the appellant herein, and files the following assignment of errors on appeal from an order of this Court dated May 5th, 1925, complaining as follows:

1. The Court erred in matter of law in finding that the contract between your petitioner and the bankrupts did not constitute the bankrupts the agents of your petitioner for the transmission to foreign

countries of funds delivered to the bankrupts by petitioner. 697

2. The Court erred in matter of law in finding that the bankrupts were not trustees for the petitioner of the moneys delivered to them by petitioner.

3. The Court erred in matter of law in holding that there was no fiduciary relationship between petitioner and bankrupts.

4. The Court erred in matter of law in finding that there had not been an equitable assignment of the fund in question by Banca Commerciale Italiana. 698

5. The Court erred in matter of law in finding that petitioner by availing itself of the bankrupts "Drawing Service" never agreed to assume any risk of loss by the bankrupts of the funds placed in the bankrupts hands.

6. The Court erred in matter of law in finding that petitioner was not entitled to recover as prayed by it.

7. The Court erred in matter of law in overruling petitioner's exceptions to the report of the Special Master herein and in confirming said report. 699

WHEREFORE appellant prays that said order and decree herein for the manifest errors aforesaid and for the other errors in the records and proceedings herein may be reversed and that the United States District Court for the Southern District of New York may be directed to enter

700 *Assignment of Errors.*

an order and decree herein granting the amended petition of appellant dated the 20th day of October, 1924, and brought on by notice of hearing dated the 29th day of August, 1924, and directing the Trustee in Bankruptcy herein to pay to appellant the sum of $1,191.20, together with its costs and disbursements herein.

Dated, July 31, 1925.

FIRST NATIONAL BANK OF TRINIDAD, COLO.,
By O'BRIEN, BOARDMAN, PARKER & FOX,
Attorneys for Appellant,
701 120 Broadway,
New York City.

702

703

Notice of Filing Petition to Revise.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL, MARY W KNAUTH and THEODORE W. KNAUTH, doing business as co-partners under the firm name and style of KNAUTH, NACHOD & KUHNE, and OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL and THEODORE W. KNAUTH, individually, Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	In Bankruptcy No. 34996.
In the Matter *of* THE RECLAMATION CLAIM OF THE FIRST NATIONAL BANK OF TRINIDAD, COLORADO.	

704

705

SIRS:

PLEASE TAKE NOTICE that on the 31st day of July, 1925, at 10:30 o'clock, we shall file in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, in the City of New York, a petition for review in the above en-

706 *Notice of Filing Petition to Revise.*

titled cause, a copy of which petition is annexed hereto and made a part of this notice.

Dated, New York, July 28th, 1925.

Yours, &c.,

O'BRIEN, BOARDMAN, PARKER & FOX,
Attorneys for Petitioner,
120 Broadway,
New York City.

To ROSENBERG & BALL,
Attorneys for Trustee,
707 74 Broadway,
New York City.

708

Petition to Revise. 709

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL, MARY W KNAUTH and THEODORE W. KNAUTH, doing business as co-partners under the firm name and style of KNAUTH, NACHOD & KUHNE, and OSCAR L. GUBELMAN, ROLLIN C NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL and THEODORE W. KNAUTH, individually, Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	710 In Bankruptcy No. 34996.
In the Matter *of* THE RECLAMATION CLAIM OF THE FIRST NATIONAL BANK OF TRINIDAD, COLORADO.	

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT: 711

Your petitioner, the First National Bank of Trinidad, Colorado, appearing by O'Brien, Boardman, Parker & Fox, its attorneys, respectfully shows:

I.—That it is a corporation, duly organized under and by virtue of the National Banking

Laws of the United States, having its principal place of business in the City of Trinidad, in the State of Colorado.

II.—That the above named copartnership of Knauth, Nachod & Kuhne, consisting of Oscar L. Gubelman, James F. Shaw, Rollin C. Newton, Herbert B. Smithers, John R. Hall, Mary W. Knauth and Theodore W. Knauth, were duly adjudged bankrupts under the Acts of Congress relating to Bankruptcy by the United States District Court for the Southern District of New York
713 on the 12th day of January, 1924. That the said Oscar L. Gubelman, James F. Shaw, Rollin C. Newton, and John R. Hall, individually, were duly adjudged bankrupts under the Acts of Congress relating to Bankruptcy by the United States District Court for the Southern District of New York on the said 12th day of January, 1924, and and that the said Herbert B. Smithers and Theodore W. Knauth, individually, were duly adjudged bankrupt under the Acts of Congress relating to bankruptcy by the United States District Court for the Southern District of New York on the 1st day of February, 1924, and that the said Mary W. Knauth, individually, was duly adjudged
714 bankrupt under the Acts of Congress relating to bankruptcy by the United States District Court for the Southern District of New York on the 9th day of January, 1925.

III.—That the following proceedings were had in the case of the said bankrupts:

By order of the United States District Court, dated the 23rd day of April, 1924, all creditors of the above named bankrupts claiming specific money, bonds, stocks, certificates or other prop-

erty or any interest therein or the proceeds thereof in the possession of the Receiver, or which might come into his possession, were directed to file proofs of claim in and to said specific moneys, bonds, stocks, certificates or other money in the office of Robert P. Stephenson, Esq., as Special Master, on or before June 19th, 1924. Pursuant to said order, your petitioner filed its petition herein, verified the 19th day of June, 1924, in the office of Robert P. Stephenson, as Special Master, and subsequently by order of the United States District Court, dated the 15th day of October, 1924, an amended petition, verified the 20th 716
day of October, 1924, was duly filed in the office of the said Robert P. Stephenson, Special Master. That the said amended petition was for an order directing the Trustee in Bankruptcy herein to pay over to your petitioner the sum of $1,191.20 being moneys paid by your petitioner to the bankrupts under the "Drawing Service" of the said bankrupts for the purpose of paying a draft drawn by your petitioner under the said "Drawing Service" upon the Banca Commerciale Italiana, Italy, and which said money, subsequent to the filing of the petition in bankruptcy came into the possession of the Receiver in Bankruptcy and
subsequently into the possession of the Trustee in 717
Bankruptcy. That after the taking of testimony upon said petition a report was made by the said Special Master dated the 19th day of February, 1925, denying your petitioner's motion and dismissing its petition. That a motion was made to the United States District Court for the Southern District of New York to confirm the said report of the Special Master, which motion, upon notice, came on for hearing before the United States District Court for the Southern District of New York

718 *Petition to Revise.*

on the 18th day of March, 1925, and on the 5th day of May, 1925, an order was made by the said District Court affirming the said order of the Special Master of February 19th, 1925, a copy of which order of the said District Court is hereto annexed and marked Exhibit "A."

IV.—That said order was erroneous in matter of law in that—

1. The Court erred in matter of law in finding that the contract between your petitioner and the bankrupts did not consti-
719 tute the bankrupts the agents of your petitioner for the transmission to foreign countries of funds delivered to the bankrupts by petitioner.

2. The Court erred in matter of law in finding that the bankrupts were not trustees for the petitioner of the moneys delivered to them by petitioner.

3. The Court erred in matter of law in holding that there was no fiduciary relationship between petitioner and bankrupts.

4. The Court erred in matter of law in
720 finding that there had not been an equitable assignment of the fund in question by Banca Commerciale Italiana.

5. The Court erred in matter of law in finding that petitioner by availing itself of the bankrupts "Drawing Service" never agreed to assume any risk of loss by the bankrupts of the funds placed in the bankrupts' hands.

6. The Court erred in matter of law in

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finding that petitioner was not entitled to recover as prayed by it.

7. The Court erred in matter of law in overruling petitioner's exceptions to the report of the Special Master herein and in confirming said report.

WHEREFORE your petitioner, feeling aggrieved because of such order, asks that the same be reviewed, revised and reversed in matter of law by your Honorable Court, as provided in Section 24b of the Bankruptcy law of 1898, and the Rules and Practice in such case provided.

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Dated, July 28th, 1925.

FIRST NATIONAL BANK OF TRINIDAD, COLO.,
Petitioner.

O'BRIEN, BOARDMAN, PARKER & FOX,
Attorneys for Petitioner,
Office and Post Office Address,
120 Broadway,
New York City.

STATE OF NEW YORK,
County of New York, } ss.:

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ERNEST R. EARLY, being duly sworn, deposes and says: that he is a member of the firm of O'Brien, Boardman, Parker & Fox, 120 Broadway, New York City, the attorneys for the petitioner herein; that he has read the foregoing petition and knows the contents thereof and that the same is true to his knowledge.

Deponent further says that the reason why this verification is not made by petitioner and is made by him is that the petitioner is a foreign corpora-

724 *Petition to Revise.*

tion which does not maintain an office or agent in the City of New York.

ERNEST R. EARLY.

Sworn to before me this
28th day of July, 1925.

WILLIAM H. VOGT,
[NOTARIAL SEAL] Notary Public,
Queens County.

Queens County No. 1154.
Certificate filed in New York Co.
New York C. Clerk's No. 114.
New York Co. Register's No. 8086.
725 Commission expires March 30, 1926.

Exhibit "A."

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, *et al.*, trading as KNAUTH, NACHOD & KUHNE, etc., Bankrupts.	In Bankruptcy No. 34996.
726 In the Matter *of* Reclamation Claim of FIRST NATIONAL BANK OF TRINIDAD, TRINIDAD, COLO.	

This matter having duly come on to be heard on March 18, 1925, upon motion of Rosenberg &

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Ball, attorneys for the Trustee herein, for an order confirming report No. 27 of the Special Master herein, Now, upon reading and filing said report of the Special Master and the papers referred to therein and thereto annexed, and upon all of the proceedings had herein, it is, after due consideration, on motion of Rosenberg & Ball, attorneys for the Trustee herein,

ORDERED that the said report of the Special Master be and the same hereby is in all respects except as to costs and disbursements confirmed, and the reclamation claim of FIRST NATIONAL BANK OF TRINIDAD, TRINIDAD, COLO., be and the same hereby is dismissed; and it is

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FURTHER ORDERED that the Trustee be and he hereby is authorized and directed to pay Robert P. Stephenson, as Compensation for his services as Special Master, herein, $1,000.

Dated, New York, May 5, 1925.

JNO. C. KNOX,
U. S. D. J.

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Stipulation Combining Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, etc., trading as KNAUTH, NACHOD & KUHNE, etc., Bankrupts.	In Bankruptcy No. 34,996.

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It is hereby stipulated by and between the parties hereto that the record on the appeal and the petition to revise herein may be combined and printed together and that the one record may be used in both proceedings.

Dated, New York, August 10, 1925.

O'BRIEN, BOARDMAN, PARKER & FOX,
Attorneys for Appellant.

ROSENBERG & BALL,
Attorneys for Respondent.

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Stipulation as to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, etc., trading as KNAUTH, NACHOD & KUHNE, etc., Bankrupts.	In Bankruptcy No. 34,996.

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It is hereby stipulated and agreed that the foregoing is a true transcript of the Record of the United States District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, August , 1925.

O'BRIEN, BOARDMAN, PARKER & FOX,
Attorneys for Reclaimant.

ROSENBERG & BALL,
Attorneys for Middleton S. Borland, Trustee in Bankruptcy.

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Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter *of* OSCAR L. GUBELMAN, etc., trading as KNAUTH, NACHOD & KUHNE, etc., Bankrupts.	In Bankruptcy No. 34,996.

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I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the Record of the said District Court in the above entitled matter as agreed on by the parties.

IN WITNESS WHEREOF I have caused the seal of the said Court to be hereunto affixed in the City of New York, Southern District of New York, this day of , 1925.

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ALEXANDER GILCHRIST,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 155—October Term, 1925.

Argued November 18, 1925. Decided July 6, 1926.

In Re

OSCAR L. GUBELMAN and others,

Ex parte

THE FIRST NATIONAL BANK OF TRINIDAD, 740

Appellant,

MIDDLETON S. BORLAND, Trustee,

Appellee.

PETITION TO REVISE ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Before ROGERS, MANTON and HAND, Circuit Judges.

Appeal from an order of the District Court for 741
the Southern District of New York confirming the report of a special master disallowing priority in bankruptcy to a claim of the petitioner.

The bankrupts were international bankers doing business in the City of New York. A part of their business consisted in making contracts with country banks by which such banks might, with certainty that they would be honored, sell drafts to their customers drawn upon foreign banks, correspondents of the bankrupts. These

contracts read as follows: "Upon receipt of advice of draft accompanied by adequate funds payable at par in New York we," the bankrupts, "shall (sic) promptly forward our advice of the same and provide the drawee with funds sufficient for the payment of the draft abroad, or* a transfer of credit from our balance or otherwise. * * * In other words, we are employed merely as the agents of the drawers for the purpose of advising the issue of drafts and providing the drawee banks with sufficient funds to cover their pay-
743 ment."

In accordance with such a contract, the petitioner, a country bank, on May nineteenth, 1923, drew upon the Sassari branch of the Banca Commerciale Italiana for 24,360 lire in favor of one, Zara Sanna Giovanni. On the same day it advised the bankrupts of the draft in the following language, which the bankrupts had prescribed in the forms accompanying the contract: "Pursuant to the terms and conditions governing your drawing service we have sold draft bearing the above number, dated Trinidad, Colorado, May 19, 1923, for Lir. 24,360 and shall thank you to pro-
744 tect same upon presentation. We remit herewith the sum of $1,191.20." This advice was accompanied by a cheque covering the draft in question and another. The bankrupts cashed the cheque and on the twenty-second wrote to the drawee as follows: "Please protect to the debit of our account the drafts as per particulars." Among such particulars were several drafts drawn upon the drawee's Sassari branch, includ-

*The word "or" should be "by". See Record, page 141, folio 422.

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ing by specific description the draft in question.

The bankrupts had on deposit with the drawee funds sufficient to cover the drafts so advised, against which the drawee debited the drafts and stopped interest upon the amount so debited. It made a corresponding credit at the same time in an account entitled, "drafts payable." Both entries were made before petition filed, and were in accordance with a standing agreement between the bankrupts and the drawee.

The draft was presented for payment after petition filed and was dishonored. Thereafter the 746
receiver procured from the drawee a reversal of the charge on its books against the bankrupts, of the credit in favor of the draft in the account, "drafts payable," and a remittance of the restored deposit. The petitioner as drawer was compelled to take up the draft after dishonor, and now presents its claim as a preferred creditor, on the ground among others that the holder of the draft had become an equitable assignee of the bankrupts' deposit with the drawee. The trustee, who succeeded below, admits the right of the petitioner as general creditor, but denies the priority.

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The trustee also relied upon a custom which obtained in business done under such an arrangement. If the correspondent of the foreign drawee wished to cancel a draft, he might so advise the drawee, who would thereupon reverse the credits and remit the deposit or make such other disposition as was directed. The correspondent might be himself the drawer, or have the relation to the draft of the bankrupts. The only instances of the practise known to the witnesses were those

748 *Opinion.*

in which the draft had been already cancelled, or at least when it was not outstanding in the hands of a holder in due course.

William D. Manice, Allen R. Memhard and George Trosk, all of New York City, for the petitioner-appellant.

Godfrey Goldmark, George G. Ernst and Ralph F. Colin, all of New York City, for the trustee below.

Logan Hay and Sidney Wetmore
749 Davidson, of New York City, as *amici curiae* for parties similarly interested.

Hand, Circuit Judge (after stating the facts as above):

It does not seem necessary to us to decide whether the bankrupts remained liable upon the draft after they had posted the advice to the drawee and the drawee had made the necessary entries on its books. Even if they did so remain, they could so finally and completely devote a part of their balance with the drawee to the payment
750 of the draft as to create themselves constructive trustees pro tanto for the benefit of the holder, and disable themselves thereafter from recalling what they had done. Performance once executed was irrevocable, because there was no intimation of any right to revoke it, and because the continued liability of the bankrupts was not an equivalent of performance, as the event proved. An obligee is not exposed to the renewed hazard of performance, once the obligor has performed, nor may the obligor at his whim undo that which

he once did in satisfaction of his promise. For the moment we reserve any difference which the supposed custom might create.

It is, however, proper to observe that if, as we think, the bankrupts did not remain liable after performance, their action in advising the drawee to transfer the credits was more plainly a final appropriation of the deposit than it would otherwise have been. On such a view by those acts they had acquitted themselves of all their obligations and certainly the contract intended that they should secure payment of the draft. If they secured it at all, it must have been when they did 752
the last necessary act. As a make-weight, therefore, we give our reasons for saying that the limit of their obligation was to secure the entries upon the drawee's books. If they had meant to become guarantors, the relation and the word were familiar enough, and it seems to us incredible that they should not have said so more unequivocally. Instead, they used language which cannot by any stretch be confused with a guaranty; their only undertaking was to advise the drawee, and to put him in funds. They expressly liimted their employment "merely as agents of the drawees' for these purposes. Again, on the 753
cover of the form-book which the trustee at least insists was a part of the contract these were said to be their "sole function." How it can be thought that the bankrupts remained any longer liable, once the drawee set up the credit in favor of the holder, we cannot understand. That was the whole of their stipulated performance, and there is no room for implications.

The trustee replies by insisting upon the language of the drawer's advice when remitting the

covering funds; "we shall thank you to protect" the draft. Although that phrase was selected by the bankrupts, it will not serve to avoid the contract itself. "Protect" may indeed in other contexts mean "guaranty," but not in this. We are to make the whole language read consistently, and if "protect" means "guaranty," the "mere employment" as, and the "sole function" of, a remitting agent must be consistent with assuming absolute responsibility for the payment of the draft. Certainly they are not. On the other hand it does not wrench the word to say that the
755 drafts are protected when the drawees are put in funds. We have no evidence that the bankrupts' profit was adequate for any larger responsibility, but if it was, none was assumed.

With this conclusion as a background we have to consider whether the contract and the action under it created an equitable assignment. It is of course true that a cheque or draft is not an assignment of funds on deposit with the drawee, though there is respectable authority to the contrary. It is not entirely clear why on principle the holder should not be allowed to sue upon the drawee's general promise to the drawer to honor
756 his orders. Perhaps as Mr. Williston says, (*Williston on Contracts*, Sec. 389), closely considered, the drawee is only the drawer's agent to pay, yet even so, the promise of an agent is as binding as anyone's else and it seems rather hard to escape the conclusion that the drawee has promised to honor drafts so long as he remains in funds. For whatever reasons courts have gone far to find indications in such cases of an independent agreement to assign an interest in the funds. The

most conspicuous case was *Fourth Street Bank* vs. *Yardley*, 165 U. S., 634, 17 S. Ct. 439, 41 L. Ed., 855, where the agreement was spelled out from circumstances far less cogent than those at bar. Similar instances are *Farley* vs. *Turner*, 26 L. J. Chan., 710; *Burns* vs. *Carvalho*, 4 Milne & Craig, 690; *Coates* vs. *First National Banks*, 91 N. Y., 20; *Muller* vs. *Kling*, 209 N. Y., 239, 103 N. E., 138; *In re Hollins*, 215 F. 41, 131 C. C. A., 349, L. R. A. 1915 B, 438 (C. C. A. 2). The rule is but an illustration of the general principle that an executory agreement may create such a right, if it 758
plainly enough indicates a purpose to appropriate specific property for the payment of a debt, *Walker* vs. *Brown*, 165 U. S., 654, 17 S. Ct., 453, 41 L. Ed., 865; *Ingersoll* vs. *Coram*, 211 U. S., 335, 29 S. Ct., 92, 53 L. Ed., 208; *Hurley* vs. *Atchison etc. R. R.*, 213 U. S., 126, 29 S. Ct., 466, 53 L. Ed., 729; *Parlin etc. Co.* vs. *Moulden*, 228 F., 111, 142 C. C. A., 517, L. R. A. 1917 B, 130, (C. C. A. 5); *Curtis* vs. *Walpole etc. Co.*, 218 F., 145, 134 C C. A., 140, (C. C. A. 1). As in the case of a trust, with which it is closely allied, the intent depends upon the form of the transaction and is necessarily subject to no exact test, *Steel Cities* 759
Chem. Co. vs. *Va. Car. Chem. Co.*, 7 F., (2d), 280, (C. C. A. 2); *Rogers Locomotive Works* vs. *Kelley*, 88 N. Y., 234.

The contract in the case at bar clearly contemplated a final appropriation of the deposit, for the benefit of the holder of the draft. The phrase, "transfer of credit", could only have meant a cancellation of the bankrupts' interest in their balance and an establishment of a corresponding

credit in favor of the holders of the drafts. The action taken by the drawee was, *prima facie* at any rate, consistent only with that purpose. We are of course aware that entries upon bankers' books are not conclusive evidence of a completed transaction. *In re Gubelman, ex parte Latzko & Popper,* 10 F. (2d), 926, (C. C. A. 2). But they are none the less probative. If the bankrupts had had no balance with the drawee but had remitted funds specifically to cover the draft, we can hardly suppose that it would be argued
761 that these were not specifically attributed to the benefit of the holders, and available to them. Yet the contract treats that situation as an alternative to the transfer of credit. It cannot be that what was a final appropriation in one case was not in the other. Therefore, it seems to us that the agreement to transfer the credit, followed by its actual transfer, provided a fund which the drawee was obliged to devote to the payment of the draft, that is, that it created an equitable assignment or an irrevocable declaration of trust by the bankrupts.

The cases relied on by the trustee are not con-
762 trolling. In *Eastman Kodak Co.* vs. *National Park Bank* (D. C.), 231 F. Rep., 320 and 247 F. 1002, 159 C. C. A. 662 (C. C. A. 2), the drawee had not transferred the credits and so far as appeared, remained free to pay the drafts in the order of their presentation. Mere notice by the drawer does not establish a priority upon the fund in favor of the drafts advised. It is a vital difference when the drawee by specific credits provides for specific drafts. These must then be

paid, no matter how many others come in before them, and that implies a final appropriation *pro tanto*. Our decision in *Re Interborough Consolidated Corp.*, 288 F. 334, 32 A. L. R. 932, is quite remote. There, the mortgagor did not establish a credit on which the bondholders might draw, but drew cheques itself t opay the coupons. More nearly akin is *Noyes* vs. *First National Bank*, 180 App. Div., 162, 167 N. Y. S. 288, affirmed 224 N. Y., 542, 120 N. E. 870, where the bondholders presented their coupons direct to the disbursing agent who paid them itself. However, the funds 764
were not credited to the bondholders on the books of the agent. On the contrary, we think that they were credited, perhaps somewhat ambiguously, as an account of the debtor, though for its convenience the ultimate destination of the money appeared in the title. In the first place we are not prepared to agree that there is no difference between a payment made by the debtor at its agent's office and a payment made by the drawee of a draft. But even if there be none, there is a wide distinction between an account of the debtor, however, tagged or ear-marked, and a transfer of credit from the debtor to the creditor. *Erb* vs. *Banco di Napoli* (May 25, 1926), 243 N. Y. 45, 765
152 N. E. 460 adds nothing to Noyes's case.

The law in New York apparently is otherwise in respect of dividends, *LeRoy* vs. *Globe Ins. Co.*, 2 Edw. Ch. 657; *In re Le Blanc*, 14 Hun 8, affirmed 75 N. Y., 598, *In re Interborough Consolidated Corp.* (D. C.), 267 F. 914. The distinction is not very clear because a dividend once declared is a debt, but unless the later cases have over-

ruled the earlier, it is only fair to say that Noyes's case must be regarded as close to the line.

There remains the question of custom. The evidence went no further than to show a practise of reversing the credits when the draft was cancelled. That was natural enough, but it is quite another thing to do so while the draft is outstanding. A custom which should allow the rights of a holder to be so changed, once they had become fixed in accordance with contracts made in his interest, ought to be proved by the most cogent evidence, if it could be valid at all. There was
767 not even an intimation that it went so far.

The last point is that in the absence of any proof of Italian law we cannot say what was the legal consequence of the entries made by the drawee in Italy. If the case involved the holder's rights against the drawee upon the deposit that might be true, but it does not. The question is whether the bankrupts made themselves constructive trustees of their claim against the drawee; that quesion depends upon the law of the place where the supposed trustees acted. We cannot regard the making of the entries as the declaration of trust, even though without them the ap-
768 propriation would have been incomplete. The bankrupts' fiduciary relation to the deposit was created by the contract, and by their appropriation of their funds to the benefit of the holder. These took place here. The drawee's compliance with their orders was at most only a condition, and the law of the place where the condition was fulfilled did not determine the effect of the declaration, but the law of the place where the declaration itself was made.

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In view of the foregoing discussion it is unnecessary to consider the petitioner's first point, i. e., whether the bankrupts originally received the petitioner's cheque in a fiduciary capacity.

The order is reversed and the cause is remanded with instructions to grant the petitioner a priority in its claim.

Rogers, Circuit Judge, because of illness, has been unable to take part in this decision.

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Judgment.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 13th day of July one thousand nine hundred and twenty-six.

Present—Hon. Henry Wade Rogers,
Hon. Martin T. Manton,
Hon. Learned Hand,
773 Circuit Judges.

In the Matter

of

Oscar L. Gubelman, *et al.*, trading as Knauth, Nachod & Kuhne, etc.,

Bankrupts,

First National Bank of Trinidad, Colorado,

774 Petitioner.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

Judgment. 775

On Consideration Whereof, It is now hereby ordered, adjudged, and decreed that the order of the said District Court be and it hereby is reversed with costs, and cause remanded with instructions to grant the petitioner a priority in its claim.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M.
L. H.

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United States of America, }
Southern District of New York, } ss.:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 252 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

In the matter of Oscar L. Gubelman et al., trading as Knauth, Nachod & Kuhne, etc.,

Bankrupts, 777

First National Bank of Trinidad, Colorado,

Petitioner.

as the same remain of record and on file in my office.

778 *Judgment.*

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 5th day of August in the year of our Lord One Thousand Nine Hundred and twenty-six and of the Independence of the said United States the One Hundred and Fifty-first.

(signed) William Parkin,
[seal] Clerk.

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Supreme Court of the United States

Order Allowing Certiorari—Filed November 23, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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